RECORD, CASE No. 15,140.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 1170.

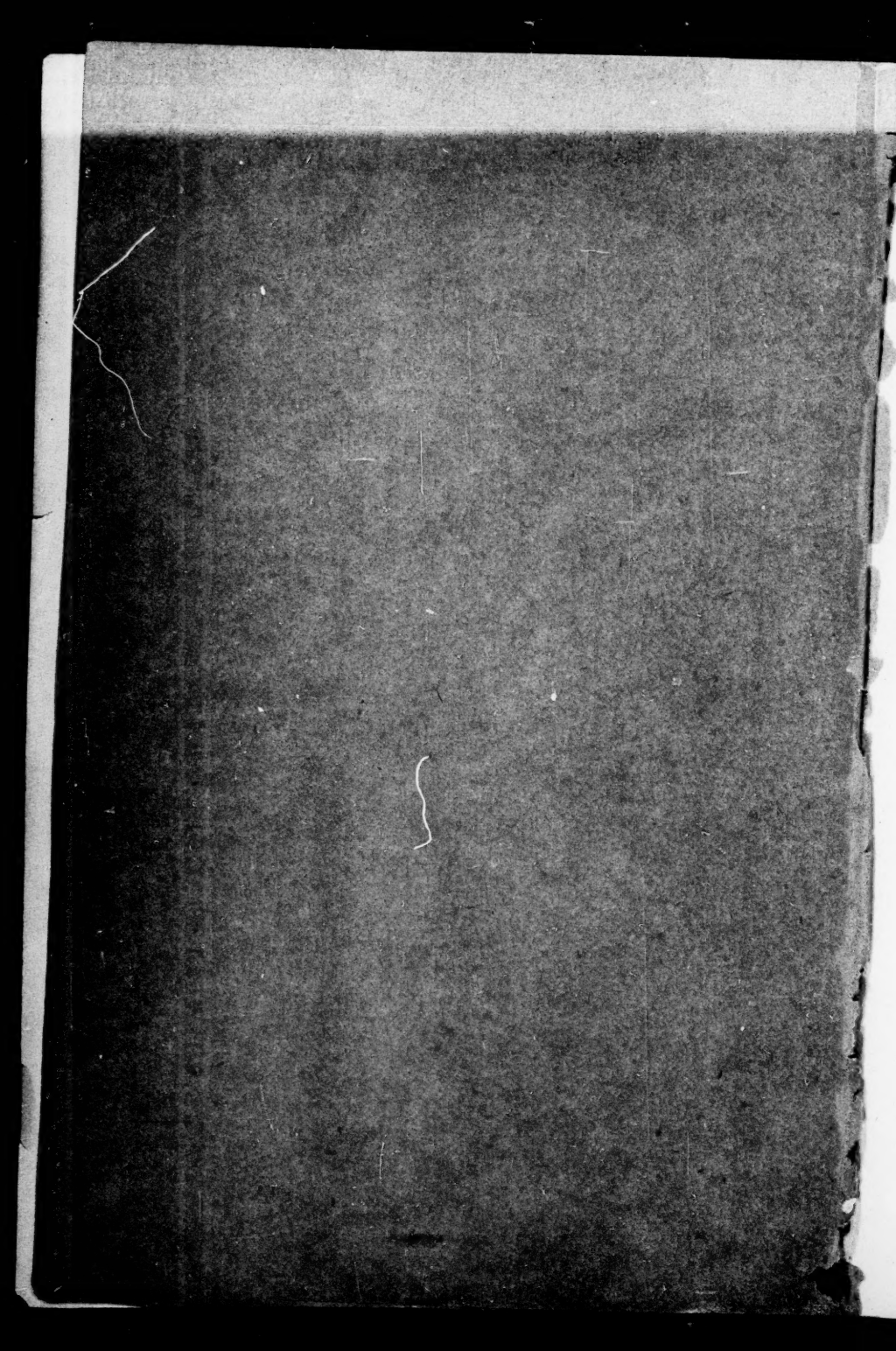
WILLIAM McPHERSON, JUNIOR, J. HENRY CARSTENS, ET AL., PLAINTIFFS IN ERROR,

vs.

ROBERT R. BLACKER, SECRETARY OF STATE OF THE STATE OF MICHIGAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

FILED SEPTEMBER 16, 1892.



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INDEX.

	Original.	Print.
Petition	1	1
Exhibit 1—Affidavit of Henry A Haigh and Henry M. Duffield	14	8
2—Affidavit of Henry M. Duffield	15	9
Clipping from "Evening News," March 17, 1892	17	10
Clipping from "Detroit Tribune," March 18, 1892	18	11
Affidavit of Henry M. Duffield	21	12
J. Henry Carstens and Henry A. Haigh	23	13
William McPherson, Jr.	23	13
Henry M. Duffield	24	13
Order to show cause	25	14
Answer	27	15
Order amending answer	33	18
Argument and submission	34	18

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 22, 1892.

	Original.	Print
Opinion	35	19
Judgment	54	29
Petition for writ of error	55	30
Bond	58	31
Citation	61	32
Docket entries	63	33
Writ of error	64	33
Clerk's certificate	67	34

1 *Petition.*

STATE OF MICHIGAN:

In the Supreme Court.

The petition of William McPherson, Junior, Jay A. Hubbell, J. Henry Carstens, Charles E. Hiscock, Otto Ihling, Philip T. Colgrove, Conrad G. Swensburg, Henry A. Haigh, James H. White, Fred. Slocum, Justus S. Stearns, John Millen, Julius T. Hannah, and J. H. Comstock respectfully shows unto this court—

1. That they are electors and citizens of the State of Michigan and of the United States and are members of the political party or organization in this State known as the Republican party and recognized as such political party by the laws of this State and entitled thereunder to have tickets containing the names of its candidates officially printed in all the counties of this State.

2. That the State of Michigan is entitled under the laws of the United States to two Senators and twelve Representatives in Congress, and under the Constitution of the United States, article 2, section 2, each State is required to appoint a number of electors of President and Vice-President of the United States equal to the whole number of Senators and Representatives to which such State may be entitled in the Congress.

2 3. That at the regularly called State convention of said Republican party duly held in the city of Detroit on Thursday, the fourteenth day of April, 1892, for the purpose, among other things, of nominating electors for President and Vice-President of the United States, your petitioners were duly nominated as candidates for the offices of electors of President and Vice-President of the United States for the State of Michigan, and that they have duly accepted such nomination and intend and desire to be voted for as such electors of President and Vice-President of the United States by the electors of this State at the next general election.

4. That neither of your petitioners is a Senator or Representative to the Congress of the United States, and that neither of your petitioners holds any office of trust or profit under the United States.

5. That since the admission of the State of Michigan into the Union of the United States of America the electors of President and Vice-President of the United States, provided for by the second paragraph of article 2 of the Constitution of the United States, to which the State is entitled, have always been elected by general ticket at the general election next preceding the choice of President and Vice-President, in accordance with the laws of the State of Michigan to that effect, Howell's Statutes, sec. 240, and it has always been the duty of the secretary of state, under sec. 147 of Howell's Statutes, to direct and cause to be delivered to the sheriff of each county in this State the notice hereinafter referred to, and such notice has always hitherto been given.

6. That the next general election next preceding the choice of President and Vice-President of the United States will be held in

this State pursuant to law on Tuesday, the eighth day of November,
1892, and that it is the duty of the secretary of state of the
3 State of Michigan, under Howell's Statutes, sec. 147, between
the first day of July and the first day of September next, to direct and cause to be delivered to the sheriff of each county in this State a notice in writing that at such election there will be chosen electors of President and Vice-President of the United States.

7. That on the twenty-sixth day of April, 1892, your petitioner Henry A. Haigh, in his own behalf, together with Henry M. Duffield, the duly authorized attorney of all your petitioners, acting on behalf of all the others of your petitioners, applied to the Honorable Robert R. Blacker, who your petitioners aver is the secretary of state of the State of Michigan, and requested and demanded of him that he, as such secretary of state, direct and cause to be delivered to the sheriff of each county in this State, between the first day of July and the first day of September next, a notice in writing that at the next general election in this State, to be held on the eighth day of November, 1892, there will be chosen, among other officers, electors of President and Vice-President of the United States for the State of Michigan, and requested him to declare whether he would direct and cause to be delivered such a notice to the sheriff of each county in this State.

8. That the Honorable Robert R. Blacker, secretary of *the* state of State of Michigan, declined to promise to direct and cause to be delivered such notices within the times aforesaid and stated that he would not direct and cause to be delivered such notices within the times aforesaid, but would obey and follow the provisions of the so-called act of the legislature of the State of Michigan known as act No. 50 of the Public Acts of 1891, hereinafter more particularly referred to, and your petitioners hereto attach the affidavit of Henry A. Haigh and Henry M. Duffield, marked Exhibit I, and pray leave in this connection to refer to the same and to make the same a part of this their petition.

4 9. That at the last session of the legislature of the State of Michigan a so-called act of the legislature of the State of Michigan known as act No. 50 and entitled "An act to provide for the election of electors of President and Vice-President of the United States, and to repeal all other acts and parts of acts in conflict therewith," approved May 1st, 1891, was pretended to be passed by said legislature, and in and by said so-called act it was attempted to provide that one elector of President and Vice-President of the United States should be elected by the electors of each of the two so-called electoral districts attempted to be established by said so-called act No. 50, to be known and designated on the ballots respectively as eastern district elector of President and Vice-President of the United States at large and western district elector of President and Vice-President of the United States at large; and also that one elector should be elected by the electors of each of the congressional districts referred to in said act, to be known as "elector of President and Vice-President," and the ballots for whom should designate the number of the congressional district and the person to be voted for

therein as "district elector of President and Vice-President of the United States." Said so-called act No. 50 further attempted to provide for the election in like manner respectively of an eastern district alternate elector of President and Vice-President of the United States at large and western district alternate elector of President and Vice-President of the United States at large, and also attempted to provide for the election in the several congressional districts of the State of alternate district electors of President and Vice-President of the United States. Said so-called act No. 50 also attempted to provide for other proceedings respecting the election of electors of President and Vice-President of the United States which are in conflict
5 with the Constitution and laws of the United States passed in pursuance thereof, and to regulate their powers and duties in a manner at variance with and repugnant to the Constitution and laws of the United States.

10. That your petitioners are advised by counsel learned in the law and insist that said so-called act No. 50 is defective, illegal, unconstitutional, void, and of no effect for the reasons hereinafter more particularly stated, but that notwithstanding the unconstitutionality and illegality of said so-called act No. 50 the Honorable Robert R. Blacker, secretary of state of the State of Michigan, declares that it is his intention to regard the same as valid and legal and to obey the provisions thereof and to consider and treat the same as repealing and annulling such parts and so much of the laws of the State of Michigan and the acts of Congress and Constitution of the United States as conflict therewith; and further declares it his intention and, as your petitioners are informed and believe, in fact intends to disregard and disobey the existing valid laws of the State of Michigan requiring the election of electors of President and Vice-President of the United States to be by general ticket and the entire vote of the State, and to disregard and disobey the acts of Congress and Constitution of the United States and the amendments thereto which require that electors of President and Vice-President of the United States shall be appointed by each State and recognize and declare the right of the male inhabitants of each State, being twenty-one years of age and citizens of the United States and not otherwise disqualified, to vote at any election for the choice of electors for President and Vice-President of the United States.

11. That your petitioners are advised and charge the fact to be that said so-called act No. 50 of the Public Acts of 1891 is defective, illegal, unconstitutional, and void for the following, among other, reasons:

6 (1.) Because the so-called act contains no provisions for the giving of any notice by the secretary of state or any other public officer of the State of Michigan of the election of electors of President and Vice-President of the United States by districts or in the manner attempted to be provided by said so-called act.

(2.) Because it wholly and utterly fails to provide any means, and there is no existing law providing any means for the counting, canvassing, and certifying of the votes which may be cast for either the so-called electors at large or so-called district electors in the so-

called first congressional district, which is a part of the city of Detroit, or in those portions of the second, sixth, and seventh congressional districts which are fractions or parts of the city of Detroit and of the county of Wayne, and there is no designation made by said so-called act No. 50 nor under existing laws of any persons to act as a board of canvassers, nor any provision for the organization of any board of canvassers (and the appointment of any clerk thereof) to count, canvass, and certify the votes cast in the aforesaid parts of the city of Detroit and Wayne county or any one of such parts; and your petitioners aver that at the last gubernatorial election held in the State of Michigan in the year 1890 the total number of votes cast in that portion of the city of Detroit which constitutes the so-called first congressional electoral district under said so-called act No. 50 was 26,337; and your petitioners aver that at the said last gubernatorial election held in the State of Michigan the total number of votes cast in that portion of the county of Wayne which constitutes a part of the so called second congressional electoral district under said so-called act No. 50 was 4,775; and your petitioners aver that at the last gubernatorial election held in the State of Michigan
7 the total number of votes cast in that portion of the city of Detroit and that portion of the county of Wayne which constitutes a part of the so-called sixth congressional electoral district under said so-called act No. 50 was 6,480; and your petitioners aver that at the last gubernatorial election held in the State of Michigan the total number of votes cast in that portion of the county of Wayne which constitutes a part of the so-called seventh congressional electoral district under said so-called act No. 50 was 744.

(3.) Because said so-called act makes no provision, and there is no existing provision of law which makes it the duty of or confers any authority on any public officer, either Federal, State, or municipal, to transmit copies of any statements of votes given for electors of President and Vice-President of the United States or any returns of said election in those portions of Wayne county and the city of Detroit, or any one of them, which, under the terms of said so-called act No. 50, comprise the first congressional electoral district and are parts of the second, sixth, and seventh congressional electoral districts.

(4.) Because there is no provision, either in the so-called act No. 50 or in any existing statute under which the board of State canvassers or *of* any other board of canvassers or any other public officer, can either receive any statements of votes given in those portions of the city of Detroit and Wayne county comprising, under the terms of said so-called act No. 50, the first congressional electoral district and parts of the second, sixth, and seventh congressional electoral districts, or make a statement of the number of such votes given for such electors, and show the names of the persons and the whole number of votes given to each person.

(5.) Because said so-called act attempts to provide for the election of alternate electors of President and Vice-President of the United

States at large and alternate district electors of President and
8 Vice-President of the United States who are required by said so-called act to attend at the time and place of the meeting of the electors, and are authorized by the provisions of said act to receive the sum of five dollars for each day's attendance and five cents per mile for the actual and necessary distance traveled each way in going to and returning from said place of meeting, whereas the title of said so called act No. 50 makes no reference to and gives no indication of any purpose of the act to provide for alternate electors of President and Vice-President of the United States, either at large or in districts, so that in legal effect said so-called act No. 50 fails to provide for the filling of any vacancies which may exist among the electors, and is therefore fatally defective.

(6.) Because, even if alternate electors at large and alternate district electors could be legally elected under said so-called act, the said so-called act only attempts to provide for the filling by one person of a vacancy in the office of one particularly designated elector at large or of one particularly designated district elector, and in the case of the disability or death or absence of the elector so designated, and also the current disability or death or absence of such elector's alternate elector thus particularly designated, such vacancy cannot be filled under the law.

(7.) Because said so-called act No. 50 is repugnant to article 2, paragraph 2, of the Constitution of the United States, in this, that said so-called act attempts to provide for the appointment of the electors of President and Vice-President of the United States, to which the State is entitled, fractions of the territory of the State, and by the votes of portions of the electors of the State and not by the act of the State as a body politic, as required by article 2, paragraph 2, of the Constitution of the United States.

(8.) Because the said so-called act is repugnant to the 14th
9 amendment of the Constitution of the United States, in this, that it deprives the male inhabitants of this State, being twenty-one years of age and citizens of the United States, of their right to vote at an election for the choice of electors for President and Vice-President of the United States, and abridges the same for causes other than participation in the rebellion or other crime.

(9.) Because the said so-called act is in conflict with the provisions of the act of Congress approved February 3, 1887, which requires that the electors of each State shall meet and give their votes on the second Monday in January next following their appointment and makes it the duty of the executive of each State as soon as practicable after the conclusion of the appointment of electors of such State to communicate, under the seal of the State, to the Secretary of State of the United States a certificate of the ascertainment of the electors appointed, setting forth the names of such electors and the canvass or other ascertainment under the laws of such State of the number of votes given or cast for each person for whose appointment any or all votes have been given or cast, and also thereupon to deliver to the electors of such State, on or before the day on which they are required to meet, the same certificate in triplicate under the seal of

the State; whereas the said so-called act No. 50 attempts to provide for the meeting of the electors of President and Vice-President on the first Wednesday in December following their election, and requires the secretary of state to prepare three lists of the names of the electors and alternate electors, procure thereto the signature of the governor, affix the seal of the State to the same, and (said secretary of state and not the executive) deliver such certificate to one of the electors (not to the electors) on or before the first Wednesday of December next following said general election, and makes no
10 provision for and omits all reference to sending any certificate or list to the Secretary of State of the United States setting forth the names of the electors and the canvass or other ascertainment of the votes given or cast for each person for whose appointment any and all votes have been given or cast.

(12.) That, as your petitioners are advised by counsel, article 2, paragraph 2, of the Constitution of the United States imposes upon the several States a duty to the United States, and that in the performance of that duty the State executes a function under the Constitution of the United States and therefore questions may and are likely to arise in this proceeding which will involve the construction of the Constitution of the United States and of the acts of Congress passed in pursuance thereof, and that upon such questions the decision of this honorable court is reviewable in the Supreme Court of the United States; that according to the rules and practice of said Supreme Court of the United States the same adjourns *sine die* early in the month of June in each year, and there is no term or session of said court thereafter until the second Monday of the October following.

And your petitioners further show that it has been published in the public press and has not been denied that the governor of this State, who is a member of the Democratic party, which is a political party opposing the party to which your petitioners belong, has openly stated to the reporters of the newspapers that if the State supreme court decides against the validity of said so-called act No. 50 the Democrats will apply to the United States Supreme Court and pending a final decision, which said governor is reported to have stated could not possibly be obtained in time to apply to the next general election, the law will stand and the election will be held in accordance with its provisions; and that it was also given out by said governor of this State in the public press in the same
11 interview, and has not been denied by him that his party will control the returning boards, and that unless a final decision is received from Washington prohibiting their action they will give certificates of election to the electors chosen under the Miner law, being the so-called act No. 50, and will entirely ignore the old law and its provisions, and your petitioners attach hereto copies of such public interviews in the Detroit Evening News and the Detroit Daily Tribune, verified by the affidavit of Henry M. Duffield, marked Exhibit 2, and pray leave in this connection to refer to the same and to make the same a part of this their petition; and they further show unto the court that although the time allowed by law

to the secretary of state in which to direct and cause to be served upon the sheriff of each county in this State a notice of election of electors of President and Vice-President of the United States as aforesaid does not expire until the first day of September next, yet, for the reasons hereinbefore stated, it would be impossible if your petitioners waited until the expiration of said period to obtain a final and conclusive determination of their rights in time to be of any practical utility.

And your petitioners further show that there is great and widespread interest among the electors of the State of Michigan in the question of the validity of said so-called act No. 50, and that, as your petitioners are informed and charge the truth to be, it is the unanimous wish and desire of the voters in this State belonging to the Republican party, who numbered at the last presidential election over 236,000, to cast their individual votes for all of the electors of President and Vice-President of the United States to which this State is entitled, and that, as your petitioners know of their own knowledge, some of the voters of this State who belong to the Democratic party and, as they are informed and believe and charge
12 the truth to be, a large number of such voters who belong to the Democratic party prefer and desire to cast their votes for all of the electors to which the State is entitled, and that among the voters of both the aforesaid parties there is serious apprehension that unless the question of the validity of said so-called act No. 50 is speedily decided by the court of last resort to which the same can come the vote of the State of Michigan in the electoral college of the United States for President and Vice-President of the United States may be lost and the said State of Michigan be deprived of its representation in said electoral college; and your petitioners represent and aver that it is absolutely necessary to a final, proper, and legal decision of the questions raised in this proceeding by the courts of justice, which alone are lawfully constituted to decide the same, and in order to avoid and prevent possible revolutionary action by one or both of the political parties over this question, with all the dangers to the public peace incident thereto, that there should be a speedy decision upon the validity of the so-called act No. 50 of the public acts of 1891, and to that end that the said Honorable Robert R. Blacker, secretary of state of the State of Michigan, should not be allowed until the first day of September to decide whether he will issue such notices or not, but that he should be ordered to answer this petition with all reasonable speed and show cause against the same, if any there be.

Wherefore your petitioners pray:

First. That this honorable court will decide and declare that the said so-called act No. 50 of the public acts of 1891 is defective, illegal, unconstitutional, and void and of no effect, and that under the existing laws of this State there shall be elected by general tickets at the next general election to be held in this State on Tues-
day, the 8th day of November, 1892, as many electors of
13 President and Vice-President of the United States as this

State may be entitled to elect of Senators and Representatives in the Congress.

Second. That the people's writ of mandamus may be issued to said Robert R. Blacker, secretary of state of the State of Michigan, and to his official deputy, official clerks, and official agents, commanding him and his said official deputy, official clerks, and official agents and all and each of them to direct and cause to be delivered to the sheriff of each county in this State, between the first day of July, 1892, and the first day of September, 1892, a notice in writing that at the next general election in this State, to be held on Tuesday, the 8th day of November, 1892, there will be chosen (among other officers to be named in said notice) as many electors of President and Vice-President of the United States as this State may be entitled to elect of Senators and Representatives in the Congress, and that your petitioners may have such other and further relief as the nature of their case shall warrant.

And, as in duty bound, your petitioners will ever pray, etc.

WM. McPHERSON, JUNIOR,
J. HENRY CARSTENS,
HENRY A. HAIGH, AND
JAY A. HUBBELL,
CHARLES E. HISCOCK,
OTTO IHLING,
PHILIP T. COLGROVE,
CONRAD G. SWENSBURG,
JAMES H. WHITE,
FRED. SLOCUM,
JUSTUS S. STEARNS,
JOHN MILLEN,
JULIUS T. HANNAH,
J. H. COMSTOCK.
By HENRY M. DUFFIELD,
Their Attorney-in-Fact.

HENRY M. DUFFIELD,
Attorney for Petitioners.

14 EXHIBIT "1."

STATE OF MICHIGAN, } ss:
County of Wayne, }

Henry A. Haigh and Henry M. Duffield, being each duly sworn, severally depose and say that on Tuesday, the 26th day of April, 1892, they called together upon the Honorable R. R. Blacker, secretary of state of the State of Michigan, in his office, at the capitol, at Lansing, Michigan, and the said Henry M. Duffield there introduced the said Henry A. Haigh to the said secretary of state and stated that the said Henry A. Haigh was a candidate for elector of President and Vice-President of the United States for the State of Michigan, nominated by the Republican State convention held in the city of Detroit on the fourteenth day of April, 1892, and that he,

said Henry M. Duffield, was the attorney of the said Henry A. Haigh and of all the other candidates for elector of President and Vice-President nominated by the said convention, and the said Henry M. Duffield, in the name of the said Henry A. Haigh and of the other candidates aforesaid, asked and demanded of him that he as secretary of state direct and cause to be delivered to the sheriff of each county in this State, between the first day of July and the first day of September, 1892, under the provisions of section 147 of Howell's Annotated Statutes of Michigan, a notice in writing that at the next general election there will be chosen electors of President and Vice-President of the United States; that at the same time deponents pointed out to said secretary of state said section 147 of Howell's statutes, and also called his attention to the "Miner law," so called, being act No. 50 of the public acts of 1891, which
15 was also before him, and referred to its conflict in terms with said section No. 147, and also further asked the said secretary of state to declare whether he purposed to follow said section 147 or the Miner law, so called; that said Hon. R. R. Blacker, secretary of state as aforesaid, thereupon declined to do as requested and said that he would follow the Miner law, meaning said act No. 50 of the public acts of Michigan of 1891.

And further deponents saith not.

HENRY A. HAIGH.
HENRY M. DUFFIELD.

Subscribed and sworn to before me this 30th day of April, A. D. 1892.

JOHN F. McKINLAY,
Notary Public, Wayne County, Mich.

EXHIBIT "2."

STATE OF MICHIGAN, } ss:
County of Wayne, }

Henry M. Duffield, being duly sworn, deposes and says that he has read in the edition of the Evening News of the city of Detroit, issued on the 17th day of March, 1892, and cut from one of the copies of said edition the annexed clipping, purporting to give an interview between Governor Winans, the present governor of the State of Michigan, and the reporter of said paper. Deponent further says that he has read in the edition of the Detroit Tribune issued on the 18th day of March, 1892, and cut from one of the
16 copies of said edition the annexed clipping, purporting to give an interview between Governor Winans, the present governor of the State of Michigan, and the reporter of said paper. Deponent further says that said Evening News purports to be and holds itself out to the public as an independent paper and not representing any particular political party, and that, as deponent is informed and believes, the circulation of said edition of said Evening News on the 17th day of March, 1892, was 45,604 copies, and that

the circulation of the edition of said Detroit Tribune of March 18th, 1892, was 17,065 copies; and this deponent further saith that he has carefully watched the public press in the city of Detroit, and especially the editions of the Evening News and Detroit Tribune, since said 17th and 18th days of March respectively, and also the columns of the Detroit Free Press, which is a Democratic newspaper, since those dates for any denial by said Governor Winans of the correctness of said published interviews or any of them, but that this deponent has never seen any such denial or heard in any way, directly or indirectly, that Governor Winans denied or disaffirmed said interviews or either of them.

And further this deponent saith not.

HENRY M. DUFFIELD.

Subscribed and sworn to before me this 30th day of April, 1892.

JOHN F. McKINLAY,
Notary Public, Wayne County, Mich.

17 (From the Evening News, March 17, 1892.)

Miner law programme.

The Democrats, too, have been "conspiring."

Court decisions won't count.

They control the returning board and the lower house of Congress.

"Grand Rapids, Mich., March 17.—Gov. Winans is frank and open even to an extent which some people might call indiscreet. He was in town yesterday, attending the soldiers' home board meeting, and chatted freely on matters politically. In his opinion, Mr. Rich will be the Republican candidate for governor and will poll the entire party vote, but Gov. Winans has no fears of the result. The Democrats carried the State two years ago fairly and squarely, and there is no reason why they should not do so again.

"So far as he is himself concerned, he is not seeking a renomination, but if the party insists upon it—well, that would be different; but it is on the subject of the Miner electoral law that Gov. Winans waxes most interesting.

"'I have not the sightest doubt that the law is constitutional, but the Republicans have possession of the State supreme court, and that may make some difference with the decision from that tribunal,' says the governor. 'No matter what the State supreme court may be, however,' he continued, 'electors will be chosen in this State this year under that law and the voters will be counted accordingly. If the State supreme court takes a partisan course and decides against law, the Democrats will appeal to the Federal Supreme Court, and pending a final decision, which cannot pos-
18 sibly be obtained in time to apply to the November election, the law will stand and the election will be held in accordance with its provisions.'

"In getting a decision from the State court against the law the

Republicans will get the first horse, as it were, but we have several other teams to hitch onto the case. We will control the returning board, and, unless a final decision is received from Washington prohibiting this action, we will give certificates of election to the electors chosen unde. the Miner law and will entirely ignore the old law and its provisions. The action of the returning board will be passed upon by the House of Representatives, and a Democratic majority there will see to it that our electors serve. The Republicans may have one horse on us, but with a Democratic returning board and a Democratic Congress their advantage will not stay with them long."

(From the Detroit Tribune, March 18th, 1892.)

The supreme court maligned.

Governor Winans' aspersions on the State's highest tribunal.

In the Miner law litigation.

He discloses the infamous plan by which Democrats hope to carry the State.

"Grand Rapids, Mich., special telegram, March 17.—Governor E. B. Winans is the first chief executive Michigan has ever had who would openly and publicly cast aspersions upon the honesty and integrity of the State's highest tribunal of justice.

19 "Pothouse politicians and disappointed and defeated litigants may have accused the supreme court of torturing the law to defeat them, but never has the governor of the State so far forgotten his dignity and the good credit of the State as to put himself on record as believing that for partisan or other purposes the justices would construe the law other than it should be.

"Governor Winans attended the meeting of the soldiers' home board yesterday, and before leaving for home this morning chatted on political subjects, and during the conversation he outlined what would be the Democratic plan of campaign in dealing with that partisan act of a partisan legislature, 'the Minor electoral law.'

"'There is no question in my mind but that the law is entirely constitutional and valid, but the law will have to be tested before a Republican supreme court, and I would not be at all surprised if the decision were against us,' said the governor. 'But it don't matter much what the supreme court may decide. The election this year will be conducted according to the provisions of the Miner law, and the electoral vote of the State will be divided between the two parties unless, indeed, the Republicans make the mistake of trying to follow out the provisions of the old law, and then the entire vote will go to the Democracy. The Michigan supreme court will probably decide against the law. The Republicans will win the first heat on us, but we will capture all the rest of the heats and win the race. We will appeal the case to the United States Supreme Court, and in all probability it will be long after the fall election before a decision can be reached in that court. In the

meantime, while the question is hanging fire in Washington, we will proceed on the assumption that the law is valid and hold the election according to its provisions. Pending the final decision we will take it for granted that the law is good and elect presidential electors by districts instead if on a general State ticket, as heretofore.'

Where the Democrats have power.

"And what are the Republicans going to do about it? The State canvassing board is made up of the secretary of state, State treasurer, and the commissioner of the land office. These officials are all Democrats, and unless the Federal Supreme Court is heard from before the time comes for canvassing the votes the board will be guided by the provisions of the new law in making out the election certificates for the presidential electors. If the Republicans try to elect their electors on a general State ticket instead of by districts, as the law provides, the board will give all the certificates to the Democrat electors chosen by districts. If the Republicans, however, fall into line and do as we do, then they will undoubtedly get some of the votes. As for the subsequent proceedings the courts have comparatively little to do with them. If there is any question as to which set of electors will be admitted to the electoral college, the point will be disposed of, not by the courts, but by the House of Representatives, which is, you know, heavily Democrat. The Republicans may win one round in the contest, but we will win the fight, and in the coming election, if never again, the new law for choosing electors will prevail."

STATE OF MICHIGAN, } ss:
County of Wayne, }

Henry M. Duffield, being duly sworn, deposes and says that he has read in the edition of the Evening News of the city of Detroit issued on the 17th day of March, 1892, and cut from one of the copies of said edition, the annexed clipping, purporting to give an interview between Governor Winans, the present governor of the State of Michigan, and the reporter of said paper.

Deponent further says that he has read in the edition of the Detroit Tribune issued on the 18th day of March, 1892, and cut from one of the copies of said edition, the annexed clipping, purporting to give an interview between Governor Winans, the present governor of the State of Michigan, and the reporter of said paper.

Deponent further says that said Evening News purports to be and holds itself out to the public as an independent paper and not representing any particular political party, and that, as deponent is informed and believes, the circulation of said edition of said Evening News on the 17th day of March, 1892, was 45,604 copies, and that the circulation of the edition of said Detroit Tribune of March 18, 1892, was 17,065 copies.

And this deponent further saith that he has carefully watched the public press in the city of Detroit, and especially the editions of

the Evening News and Detroit Tribune since said 17th and 18th days of March respectively, and also the columns of the Detroit Free Press, which is a Democratic newspaper, since those dates for any denial by said Governor Winans of the correctness of said published
22 interviews or any of them, but that this deponent has never seen any such denials or heard in any way, directly or indirectly, that Governor Winans denied or disaffirmed said interviews or either of them.

And further this deponent saith not.

HENRY M. DUFFIELD.

Subscribed and sworn to before me this 30th day of April, 1892.

JOHN F. McKINLAY,
Notary Public, Wayne County, Michigan.

23 STATE OF MICHIGAN, } ss:
County of Wayne, }

J. Henry Carstens and Henry A. Haigh, being each duly sworn, upon their oaths severally depose and say that they are two (2) of the petitioners above named who have signed the foregoing petition; that they have heard read the same and know the contents thereof, and that the statements therein contained are true except as to such matters as are therein stated to be upon information and belief, and as to those matters they believe it to be true.

J. HENRY CARSTENS.
HENRY A. HAIGH.

Subscribed and sworn to before me this 30th day of April, 1892.

JOHN F. McKINLAY,
Notary Public, Wayne County, Michigan.

STATE OF MICHIGAN, } ss:
County of Livingston, }

William McPherson, Jr., being duly sworn, upon his oath deposes and says that he is one of the petitioners above named who has signed the foregoing petition; that he has read the same and knows the contents thereof, and that the same is true of his own knowledge except as to such matters as are therein stated to be on information and belief, and that as to those matters he believes it to be true.

WILLIAM McPHERSON, JUNIOR.

Subscribed and sworn to before me this 29th day of April, 1892.

LUKE S. MONTAGUE,
Notary Public, Livingston County, Michigan.

24 STATE OF MICHIGAN, } ss:
County of Wayne, }

Henry M. Duffield, being duly sworn, deposes and says that he is the attorney of the petitioners named in the foregoing petition and of each and every one of them, and that he has been by each and

every one of them authorized and instructed to file the petition in the name of each and every one of them as petitioners, and has been authorized by each and every one of them who does not personally sign the petition to sign their names to said petition as their attorney; that many of said petitioners reside in distant parts of this State, and that it is not practicable to obtain the personal signatures and verifications of each of said petitioners to said petition in the limited time within which said petition must be filed.

Deponent further saith that he has read said petition and knows the contents thereof, and that he has personal knowledge of all the matters alleged therein on the knowledge of petitioners, and that the contents of said petition are true of his own knowledge except as to such matters as are therein stated to be upon information and belief, and that as to those matters deponent verily believes it to be true.

HENRY M. DUFFIELD.

Subscribed and sworn to before me this 30th day of April, 1892.

JOHN F. McKINLAY,
Notary Public, Wayne County, Michigan.

(Endorsed:) Filed May 2, 1892. Chas. C. Hopkins, clerk supreme court.

25 *Order to Show Cause.*

At a session of the supreme court of the State of Michigan, held at the supreme court room, in the capitol, in the city of Lansing, on the third day of May, in the year of our Lord one thousand eight hundred and ninety-two.

Present: The Honorable Allen B. Morse, chief justice; Charles D. Long, Claudius B. Grant, Robert M. Montgomery, associate justices.

WILLIAM MCPHERSON, JR., *et al.*, Relators,
vs.
ROBERT R. BLACKER, Secretary of State of the State of Michigan, Respondent.

On reading and filing the petition and accompanying affidavits of the relators above named, and on motion of Henry M. Duffield, attorney for relators, ordered that said respondent, Robert R. Blacker, secretary of state, do show cause to this court on the twelfth day of May, instant, at two o'clock in the afternoon, why a peremptory mandamus should not be issued out of and under the seal of this court to compel him, the said secretary of state of the State of Michigan, and his official deputy, official clerks, and official agents and each of them to direct and cause to be delivered to the sheriff of each county in this State between the first day of July, 1892, and the first day of September, 1892, a notice in writing that at the next general election in this State to be held Tuesday, November 8, 1892, there will be chosen as many electors of President and Vice-President of

the United States as this State may be entitled to elect of Senators and Representatives in the Congress of the United States.

26 And it is further ordered that a certified copy of this order, together with a copy of the petition and affidavits aforesaid and upon which this order is founded, be served on the said respondent, Robert R. Blacker, secretary of state, five days before the time herein limited for showing cause.

27 *Answer.*

STATE OF MICHIGAN:

Supreme Court.

WILLIAM MCPHERSON, JR., *et al.*, Relators,
vs.
ROBERT R. BLACKER, Secretary of State of the State of Michigan, Respondent.

The answer of Robert R. Blacker, secretary of state of the State of Michigan, to the order to show cause heretofore issued why he should not be commanded by an order of this court to direct and cause to be delivered to the sheriff of each county in this State between the first day of July, 1892, and the first day of September, 1892, a notice in writing that at the next general election in this State, to be held on Tuesday, November 8th, 1892, there will be chosen as ma-y electors of President and Vice-President of the United States as this State may be entitled to elect Senators and Representatives in Congress of the United States.

The said Robert R. Blacker, secretary of state of the State of Michigan, for answer shows:

1st. That he is secretary of state of the State of Michigan and admits on information and belief that the relators are electors and citizens of the State of Michigan and are members of the Republican party and possess the necessary qualifications to hold the office of electors.

2nd. That the State of Michigan is entitled under the laws of the United States to two Senators and twelve Representatives in Congress, and by virtue of article two, section two, the State is

28 required to appoint in such manner as the legislature thereof may direct a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in Congress.

3rd. This respondent admits that — the regularly called State convention of the Republican party held in the city of Detroit on Thursday, the 14th day of April, 1892, the said petitioners were nominated as candidates for the office of electors of President and Vice-President of the United States, and that they have accepted said nomination and desire to be voted for by the electors of this State at the next general election.

And, in further answer to the third paragraph of relators' petition,

this respondent says that he denies that said relators were duly and legally nominated, and denies that the State convention of the Republican party, composed of delegates at large from all parts of the State, have any right or authority to place in nomination presidential electors in the several districts of this State; and this respondent denies that the relators are nominated to be voted for by any of the several electoral districts of this State; and this respondent alleges that the district electors should be nominated by persons who are resident electors of such districts; and this respondent alleges it to be true that the said relators were not nominated by electors from the several districts and by persons who are entitled to vote for them at the general State election, but on the contrary they were nominated by persons who, under the laws of this State, have no authority to vote for such relators when their names shall be printed upon the tickets in the manner provided by law.

And in this behalf this respondent further says that in the nomination of the several relators the districts in which they
29 were to run were not designated, and it was not designated in said nomination which of said persons should be elector at large in the eastern district nor which should be elector at large in the western district of the State of Michigan; and therefore there is no person who is legally authorized to certify the names of such persons or any of them to the several boards of election commissioners in the several counties of this State as provided by section ten of act 190 of the Public Acts of 1891, and that therefore said relators have no legal right to demand or require of this respondent that he serve any notice under section 147 of Howell's Statutes or under any other statute of the State of Michigan.

4th. This respondent admits all of the matters set forth in the fifth and sixth paragraphs of the relators' petition.

5th. In answer to the seventh and eighth paragraphs of the relators' petition this respondent says that on the 26th day of April, 1892, Henry A. Haigh and Henry M. Duffield called at the office of this respondent relative to the notice that should be given, between the first day of July and the first day of September, relating to the election of electors of President and Vice-President of the United States, and requested this respondent to declare whether he would direct and cause to be delivered to the sheriff in each county in this State the notice required in section 147 of Howell's Statutes.

This respondent says that the matter had not been called to his attention before that time, and he requested the said Henry A. Haigh and Henry M. Duffield to put their request in writing. The request on the part of this respondent was made that he might investigate the matter and then give them an answer; that the
30 said Henry A. Haigh then wrote the following: "As attorney of Mr. Haigh and the other Republican nominees for presidential electors, I make formal demand;" and after the above was written the said Henry M. Duffield took down the laws and showed to this respondent section 147 of Howell's Statutes and act No. 50 of the Laws of 1891. The said Duffield said to the said Haigh that it would be unnecessary to put the request in writing,

and said Duffield said in substance to this respondent that there was a conflict between the two laws, and that they desired the election to be held under section 147, and that the Miner law was unconstitutional. In the course of the conversation this respondent remarked, "We expect to hold the election under the Miner law;" and this respondent denies that he refused to give the notice required by section 147 of Howell's Statutes.

6th. This respondent, further answering, says that he is not a lawyer and is unacquainted with the effect that the passage of one law might have upon another, and that he did not attempt to evade any question asked him, but did not answer the question at the time, because he was not acquainted with his duty in that regard.

In further answer this respondent says that since that time he has investigated the question and taken counsel in relation thereto and he is advised and believes that there is no conflict between section 147 and act 50 of the Public Acts of 1891 or between said section 147 and act 190 of the Public Acts of 1891.

That it has always been the custom in the office of the secretary of state in giving notices under said section 147 to state in the notice the number of electors that should be printed on the ticket in each voting precinct in each county in this State, and following such custom with reference to such notice, it is the
31 intention of this respondent in giving notice under section 147 to state in such notice that there will be elected one presidential elector at large and one district presidential elector and two alternate presidential electors, one for the elector at large and one for the district presidential elector, in each voting precinct, so that the election may be held under and in accordance with the provisions of act No. 50 of the Public Acts of the State of Michigan of 1891.

7th. This respondent, further answering says that at the last session of the legislature of the State of Michigan that the legislature of this State passed act No. 50, entitled "An act to provide for the election of electors of President and Vice-President of the United States and to repeal all other acts and parts of acts in conflict herewith;" which said act was approved May 1st, 1891.

And this respondent further says that he neither admits or denies the further allegations of the ninth subdivision of the relators' petition as to the contents of said act, but expressly refers the court to said act as recorded in the Public Acts of Michigan for 1891, on pages 50 and 51.

8th. This respondent, further answering, says that he denies that said act No. 50 is illegal, unconstitutional, and void for the reasons or any of the reasons set out in the relators' petition or for any other reason, and this respondent alleges the fact to be that said act No. 50 is constitutional, valid, and binding upon this respondent and upon all the law-abiding people of the State of Michigan.

9th. This respondent, further answering, says, concerning the several allegations relative to the opinion of the governor of the State of Michigan and the reports of the public press of the
32 said reputed interviews set out and alleged in the said re-

lators' petition, that they are irrelevant and impertinent, and that none of the things alleged there have had any influence or bearing upon the actions of this respondent, and the respondent deems it entirely unnecessary to make any answer thereto, as all of said things are entirely foreign to the duties of this respondent, and whatever has taken place in such regard has been without his knowledge or procurement, and this respondent alleges that none of these matters should have any bearing upon the rights of this respondent in the premises.

ROBERT R. BLACKER,
Secretary of State.

A. A. ELLIS,
Att'y Gen'l, Att'y for Respondent.
JOHN W. CHAMPLIN,
OTTO KIRCHNER,
THOMAS E. BARKWORTH,
Of Counsel.

STATE OF MICHIGAN, }
County of Kent, } *ss:*

Robert R. Blacker, being duly sworn, deposes and says that he has heard read the foregoing answer by him subscribed and knows the contents thereof, and that the same is true of his own knowledge except as to matters therein stated to be on information and belief, and as to those matters he believes it to be true.

ROBERT R. BLACKER,
Secretary of State.

Sworn to and subscribed before me this 11th day of May, A. D. 1892.

PETER DORAN,
Notary Public, Kent County, Michigan.

(Endorsed:) Filed May 12, 1892. Chas. C. Hopkins, clerk.

33 *Order Amending Answer.*

At a session of the supreme court of the State of Michigan, held at the supreme court room, in the capitol, in the city of Lansing, on the nineteenth day of May, in the year of our Lord one thousand eight hundred and ninety-two.

Present: The Honorable Allen B. Morse, chief justice; John W. McGrath, Charles D. Long, Claudius B. Grant, Robert M. Montgomery, associate justices.

WILLIAM MCPHERSON, JR., *et al.*, Relators,
vs.
ROBERT R. BLACKER, Secretary of State of the State of Michigan, Respondent.

On motion of the attorney general, appearing for the respondent, relators' counsel not objecting thereto, it is ordered that the answer

of the respondent be, and the same is hereby, amended by adding thereto the following:

And this respondent claims and insists that he is entitled and in duty bound to act in the premises by virtue and authority of the second subdivision of the first section of article two of the Constitution of the United States and by virtue and by authority of an act of the legislature of this State, approved May 1, 1891, entitled "An act to provide for the selection of electors of President and Vice-President of the United States and to repeal all other acts and parts of acts in conflict therewith," being public act No. 50 of the Laws of 1891, which act was passed in the execution of the powers granted to the State of Michigan by the said second subdivision of the first section of article two of the Constitution of the United States, which, among other things, provides: "Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress."

And this respondent further claims and insists that by virtue and authority of an act of the Congress of the United States, approved February 3, 1887, entitled "An act to fix the day for the meeting of the electors of President and Vice-President and to provide for and regulate the counting of votes for President and Vice-President and the decisions of questions arising thereon," he is not subject to the order and control of this court in the premises.

And this respondent prays the benefit and advantage of a demurrer to said petition, because he claims and insists that the said petition does not state such a case as does entitle the relators to the relief they have therein prayed or to any relief whatsoever.

34 At a session of the supreme court of the State of Michigan held at the supreme court room, in the capitol, in the city of Lansing, on the nineteenth day of May, in the year of our Lord one thousand eight hundred and ninety-two.

Present: The Honorable Allen B. Morse, chief justice; John W. McGrath, Charles D. Long, Claudius B. Grant, Robert M. Montgomery, associate justices.

William McPherson, Jr., and Others, Relators,
vs.
The Secretary of State of the State of Michigan, Respondent.

This cause coming on to be heard is argued by Henry M. Duffield, Byron M. Cutcheon, and F. A. Baker for the relators, and by Attorney General Ellis, Thos. E. Barkworth, Otto Kirchner, and John W. Champlin for the respondent, and submitted.

35 *Opinion.*

Supreme Court of Michigan.

WILLIAM MCPHERSON, JR., *et al.*
vs.
ROBERT R. BLACKER, Secretary of State.

The relators, who are candidates for the office of electors of President and Vice-President, placed in nomination by the Republican party, ask for a mandamus to compel the respondent to give notice of an election to be held on the first Tuesday after the first Monday in November to fill said offices under the statute in former years providing for an election of electors by the State at large.

The relators allege that act No. 50 of the Public Acts of 1891, known as the Miner law, is unconstitutional and void. It is first averred that the law in question is in conflict with article II, section I, of the Federal Constitution in this, that it attempts to delegate to portions of the State fixed as districts by the legislature the power to name electors, whereas the section referred to, it is contended, confers this authority and duty upon the State at large acting as a corporate unit in its corporate capacity. Secondly, it is contended that even though the legislature may thus delegate the authority to districts, the law enacted is fatally defective in the following respects: (*a*) That it violates article IV, section 20, of the constitution of this State, which provides that no law shall embrace more
36 than one object, which shall be expressed in its title, in that it provides for an election of alternate electors, whereas the title relates only to choosing electors; (*b*) that the act is inoperative for the reason that it fails to provide means for canvassing the votes for electors in those portions of Wayne county which constitute the first, and portions of the second, sixth, and seventh electoral districts; (*c*) that even if the election of alternate electors is valid the act makes no provision for filling the office in case both the elector and the alternate shall die or become disqualified before performing their duties.

Most evidently, the question of greatest importance is that relating to the true interpretation of section 1 of article II of the Federal Constitution. The provision of that section is that "each State shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress." On both sides it appears to be conceded that the word "State," as here employed, means the body politic and corporate. On the part of the relators it is contended that the State must, in the choice of electors, act as a unit, and cannot delegate the authority to name electors to any fractional part of the State, as a district fixed for that purpose alone, or for that and other political action. On the part of the respondent it is contended that the section in question gives the legislature plenary power to prescribe how and in what manner

the State may choose its electors, whether by the legislature
37 itself or by all the electors voting for a general ticket or by electors voting in districts.

In Story on the Constitution, vol. 2, p. 304, 4th ed., it is said: "It is observable that the language of the Constitution is that 'each State shall appoint, in such manner as the legislature thereof may direct,' the number of electors to which the State is entitled. Under this authority the appointment of electors has been variously provided for by the State legislatures. In some States the legislature have directly chosen the electors themselves; in others they have been chosen by the people by a general ticket throughout the whole State and in others by the people in electoral districts, fixed by the legislature, a certain number of electors being apportioned to each district. No question has ever arisen as to the constitutionality of either mode, except that of a direct choice by the legislature. But this, though often doubted by able and ingenious minds, has been firmly established in practice ever since the adoption of the Constitution, and does not seem to admit of controversy, even if a suitable tribunal existed to adjudicate upon it."

If the question were to be determined solely by the language employed it may be admitted that there would be much force in the contention that the State must act as a unit, and that no lesser body could be delegated to perform any portion of the duty vested in the State as a body corporate, and it might possibly be held that the words "in such manner as the legislature thereof may direct" conferred only the limited power of directing how the State acting as an entirety shall make its appointment. But in my judgment these
words are clearly susceptible of a construction which confers
38 upon the legislature a power to say how the State action shall be voiced.

In such a case resort is properly had to contemporaneous construction. Judge Cooley, in his work on the Constitution, says: "Contemporaneous construction may consist simply in the understanding with which the people received it at the time or in the acts done in putting it in operation and which necessarily assume that it is to be construed in a particular way. In the first case it can have very little force because the evidences of the public understanding when nothing has been done under the provisions in question must always necessarily be vague and indecisive. But where there has been a practical construction, which has been acquiesced in for a considerable period, considerations in favor of adhering to this construction sometimes present themselves to the court with a plausibility and force which it is not easy to resist. Indeed, where a particular construction has been generally accepted as correct, and especially when this has occurred contemporaneously with the adoption of the Constitution, and by those who had opportunity to understand the intention of the instrument, it is not to be denied that a strong presumption exists that the construction rightly interprets the intention." Cooley's Const. Lim., p. 67.

This rule has been so frequently recognized both by this court and the Supreme Court of the United States as to require little more

than a reference to the authorities. Martin *vs.* Hunter's Lessee, 1 Wheat., 351; Bank *vs.* Halstead, 10 Wheat., 63; Ogden *vs.*
39 Saunders, 12 Wheat., 290; People *vs.* Dean, 14 Mich., 206; Bay City *vs.* State Treasurer, 23 Mich., 499; Detroit City Railway *vs.* Mills, 85 Mich., 646. Speaking of this rule in Ogden *vs.* Saunders, Mr. Justice Johnson says: "It proceeds upon the presumption that the contemporaries of the Constitution have claims to our deference on the question of right, because they had the best opportunities of informing themselves of the understanding of the framers of the Constitution and of the sense put upon it by the people when it was adopted by them."

In Bay City *vs.* State Treasurer, *supra*, it was held that constitutions are to be construed as the people construe them in their adoption, if possible, and the public history of the times should be consulted and should have weight in arriving at that construction. See also People *vs.* Harding, 53 Mich., 481.

The practical construction which was placed upon the section under consideration was certainly such as to maintain the contention of the respondent that the contemporaneous interpretation was that by this section plenary power was reposed in the several legislatures of the States to prescribe methods for choosing electors other than that by a vote of electors of the entire State or by any agency which in the performance of other public functions represented the entire State. In the first presidential election Maryland and Virginia each adopted the district plan. Maryland continued to so choose her electors down to and including the year 1832. Massachusetts in 1788 adopted a plan of nominating electors in districts by a vote of the people, to whom the legislature was limited in making a choice. In 1796 they were chosen
40 by districts. In New York the method of choosing electors first adopted was by vote of the legislature, but in 1825 the district system was adopted and was in use in the election of 1828. In North Carolina the district system was adopted in 1803 and in use in 1804 and 1808. In Kentucky the district system prevailed until 1828. In Tennessee the district system prevailed from 1796 to 1836. In Indiana the district system was used in 1824 and 1828. In Illinois the district system prevailed from its admission into the Union until 1827. In Maine also the district system prevailed from 1820 until and including the election of 1828. It will be seen, therefore, that the exercise of the right to choose the electors by districts began at the first election held under the Constitution and continued to be exercised by some of the States for a period of forty years. Nor was an abandonment of this method due, except possibly in a single instance, to growing doubts as to its constitutionality. The States in which it had been invoked adopted the general ticket method, it is believed, not because of any doubt of the authority to choose electors in districts, but in order that more power could be wielded by the State in political conventions. Madison, who acted as a member of the committee which reported to the Federal convention the method finally adopted for electing President, in a letter written in 1823, and in which a constitutional

amendment which should make the choice of electors by districts imperative was recommended by him, in referring to the action of the convention said: "The district system was mostly, if not exclusively, in view when the Constitution was framed and
41 adopted, and was exchanged for the general ticket and the legislative election as the only expedient for baffling the policy of the particular States which had set the example." The James Madison Letters, vol. III, 333.

Another persuasive fact in determining whether the intention was to limit the exercise of the right of the State to choose electors to a method which involved action by the State as a unit is the practical construction placed upon section II of article I, which provides that "the House of Representatives shall be composed of members chosen every second year by the people of the several States," and that until enumeration shall be made "the State of New Hampshire shall be entitled to choose three, Massachusetts eight," etc. There is certainly the same ground for contention that the authority given to a State to choose three or eight Representatives involves action by the State as a unit as there is to say that the provision that each State shall appoint electors in such manner as the legislature thereof may direct requires action by the State as a unit, and yet from the time of the adoption of the Constitution the power of the State to provide for choosing Representatives by districts has not been questioned, nor has the power to choose by an election at large been questioned (where no law of Congress intervenes), so that there has been the practical construction which has continued down to this day, which establishes that under the provisions of section II of article I the State, having authority to choose Representatives, has the choice of methods and may elect by districts or en masse.

42 But it is urged that the fact that the district system has been abandoned is evidence from which it may be inferred that there has been a growing belief in the unconstitutionality of that method, and it is further stated in the briefs of counsel that "any examination of the history of the methods of choosing presidential electors which approximates philosophic or scientific inquiry can only result in the conclusion that the States, in coming to the use of the general ticket by a common consent and practice, gave to the Constitution a construction and meaning which it might not otherwise now have, but which is nevertheless of the most conclusive and binding character."

There would doubtless be great force in the practical construction which has obtained for sixty years, even though not contemporaneous, if such construction involved of necessity a negation of the right claimed by the legislature in this case, but the fact that the several States have provided by their legislatures for choosing electors on a general ticket does not involve an assertion that the power to choose by districts does not exist, and, in so far as the argument of counsel assumes that our Constitution is subject to growth it is, in my judgment, inconsistent with the purpose and duty to sacredly maintain the integrity of that instrument, to treat

it as subject to modification except by the prescribed agencies and by the prescribed methods, and especially is it inconsistent with established rules to say that by non-user a Commonwealth may lose the power to exercise rights expressly delegated in a written constitution. If, under the Constitution and after forty years of practical construction, the State had the right to choose elect-
43 ors by districts it does not lie with any court to assert that that right has been lost to the State by non-user.

In Bay City *vs.* State Treasurer, 23 Mich., 499, Mr. Justice Cooley, speaking for the court, said: "Constitutions do not change with the varying tides of public opinion and desire. The will of the people therein recorded is the same inflexible law until changed by their own deliberative action, and it cannot be permissible to the courts that, in order to aid evasions and circumventions, they shall subject these instruments, which, in the main, only undertake to lay down broad, general principles, to a literal and technical construction, as if they were great public enemies standing in the way of progress, and the duty of every good citizen was to get around their provisions whenever practicable and give them a damaging thrust whenever convenient. They must construe them as the people did in their adoption, if the means of arriving at that construction are within their power."

It has evidently not been the view of eminent statesmen either that the original construction of this section should have been such as to exclude the power of the legislature to adopt the district method or that that power has been lost by non-user, for as late as 1874 the Committee on Privileges and Elections of the United States Senate made a report, in which, speaking of this section, it was said: "The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several States. They may be chosen by the legislature or the legislature may provide that they shall be elected by the people of the State at large or
44 in districts, as are members of Congress, which was the case formerly in many States."

But it is urged that the act in question is in conflict with the fourteenth and fifteenth amendments, and it is said that at the time these amendments were adopted the method of choosing electors actually in vogue in all the States was by vote of the people at large for a general ticket, and that as it is provided by the fourteenth amendment that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," and also provided that "when the right to vote at any election for the choice of electors of President and Vice-President is denied to any of the male inhabitants of such State, being twenty-one years of age and citizens of the United States, or in any way abridged except for participation in rebellion or other crime, the basis of representation shall be reduced," and as the fifteenth amendment providing that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude," that these amendments are to be held to have relation

to the conditions then existing, and that in effect they operate to repeal by implication so much of article II, section I, as to prescribe the manner of choosing electors.

It would, in our opinion, be a strained construction which should give to either of these amendments the effect to annul the power expressly delegated in section I of article II; but here again we are not without the aid of contemporaneous construction. As already pointed out the Committee of Privileges and Elections of the
45 Senate, composed as it was of men who participated in the adoption of these amendments, reported in 1874, in the most unequivocal terms, that this power still rested with the legislature. The question was also discussed by eminent members of the Electoral Commission of 1877. Commissioner Frelinghuysen, speaking of the power of the State to appoint electors, said: "Under this power the legislature might direct that the electors should be appointed by the legislature, by the executive, by the judiciary, or by the people. In the earliest days of the republic electors were appointed by the legislatures. In Pennsylvania they were appointed by the judiciary. Now, in all States except Colorado, they are appointed by the people." Commissioner Hoar said: "Upon the whole matter, therefore, I am of opinion that the appointment of electors and the ascertaining who has been appointed is the sole and exclusive prerogative of the State. The State acts by such agencies as it selects." Justice Field said: "The Constitution declares that each State shall appoint electors in such manner as the legislature thereof may direct. * * * With the exception of these provisions as to the number of electors and the ineligibility of certain persons, the power of choice on the part of the State is unrestricted. The manner of appointment is left entirely to its legislature." Mr. Justice Miller, commissioner, said: "If elected by the legislature, as they may be, an appropriate mode (of certifying the election) would be the signatures of the presiding officers of the two houses to the fact of such appointment or a certified copy of the act by which they were elected."

46 *In re* Kemmler, 10 Sup. C't Rep., 934, it was said: "The fourteenth amendment did not radically change the whole theory of the relations of the State and Federal government to each other and of both governments to the people."

See also Minor *vs.* Happersett, 21 Wall., 162.

It is very clear that the fifteenth amendment was intended to preclude the State from making any discrimination against citizens on account of color. No reasoning could make this plainer than does the mere reading of the provision, "The right of citizens of the United States to vote shall not be denied or abridged on account of race, color, or previous condition of servitude." There is no attempt to place limitations upon the power of the State, except that in any case where the right of suffrage is involved the class protected by this amendment shall not be discriminated against. Neither by the fourteenth nor fifteenth amendments was there any attempt to place limitations upon the authority of the State as to the choice of

officers theretofore existing. Presidential electors are still regarded as State officers. Fitzgerald *vs.* Green, 10 Sup. C't Rep., 586; and to hold that because at the time of the adoption of the fourteenth amendment the general custom was to elect by the States at large that this secured irrevocably the right of each citizen twenty-one years of age to vote directly for the number of electors to which the State is entitled would be to hold also that the method of choosing State officers, including judicial officers, which, at the time of the adoption of this amendment, obtained was irrevocably fixed beyond the power of the legislatures of the several States to
47 change. We do not think the amendment is susceptible of this construction

Does this act embrace more than one object, and, if not, is that object sufficiently expressed in its title?

It is held that the provision of the constitution requiring that the subject shall be expressed, etc., is fully accomplished when the statute has but one general object, and when such object is fairly indicated by its title. Every end and means necessary to the accomplishment of the general object need not be provided for by a separate act relating to that alone. People *vs.* Mahaney, 13 Mich., 481; Kurtz *vs.* People, 33 Mich., 279; Ryerson *vs.* Utley, 16 Mich., 270.

The title of this act is "An act to provide for the election of electors of President and Vice-President of the United States, and to repeal all other acts and parts of acts in conflict herewith."

It is said that the body of the act provides for the election of alternate electors as well as electors, and that alternate electors are not named in the title. It would hardly be contended that it was not competent, under this title, to provide for filling vacancies occasioned by the death or disability of one of the electors first chosen. This act in effect does no more than that. Technically also alternate electors are, before they become officials vested with any power whatever, electors. The sole object of their election is that they shall, in a certain event, exercise the function of electors. The question might be quite different if they were elected to a distinct office, having duties to perform and with a provision that
48 they should have added to these duties the function of electors in the event of a disability of their principal.

It is also urged as an objection to the validity of this law that in case of the death or disability of both the elector and alternate that no provision is made for filling the vacancy, and it is therefore claimed to be inoperative; but it is only necessary to say that if this be true, then any attempt to appoint electors would fail, for under the former statute existing in this State and under all statutes vesting power to fill vacancies in the electoral college death might intervene and prevent the exercise of that function.

Can the act said to be inoperative and void because so defective as that its provisions cannot be given effect? It is first claimed that the law is defective in not requiring notice of election of the district electors provided for, but we think this criticism without force. Section 147 of Howell's statutes remains in force, and by the

express terms of that statute the secretary of state is required to give notice that there are to be chosen as many of the following officers as are to be chosen at such general election, namely, a governor, * * * electors of President and Vice-President. The electors provided for in this act are to be chosen at this general election, and it is the plain duty of the secretary of state to give notice of that fact.

It is next urged that the law is defective and inoperative for the reason that no means are provided either by the act itself or the general law for canvassing votes in Wayne county.

49 The general law, act 190, public acts of 1891, provides by section 1 for inspectors of election for elections at which presidential electors may be voted for. Section 36 provides for a canvass of the votes. Section 38 requires duplicate statements of the result to be prepared, one copy of which is to be filed and the other delivered to the inspector appointed by the board to attend the county canvass. Sections 184 and 185 of How. Stat. provides that the board of canvassers shall proceed to canvass the votes, and section 185 requires the statement of votes given for electors of President and Vice-President of the United States each year in which such electors are to be chosen. The act in question in section two provides that "the counting, canvassing, and certifying of the votes cast for such electors-at-large and their alternates and said district electors and their alternates shall be done, as near as may be, as is now provided by law for the election of electors of President and Vice-President of the United States." The precise point appears to be that as the votes cast in the county for the presidential electors are cast in different electoral districts *that* there is no provision for a separate canvass of the votes cast in each district by the board of canvassers. We do not see the least difficulty in applying the law. It would, of course, be the duty of the inspector to designate the district in which the elector is voted for, and, as the district is defined by law, there is no more difficulty in doing this than there is in the board of State canvassers crediting to the one entitled the votes cast in the proper judicial circuit for circuit judge.

50 The act in question is in conflict with the law of Congress in so far as it attempts to fix a date for the meeting of electors and the method of certifying their action. Does this render the entire act inoperative? There is no doubt of the rule that where the law of a State conflicts with the law of Congress, in a matter in reference to which Congress has the right to legislate, the State law must give way to the extent of such conflict. Robinson *vs.* Rice, 3 Mich., 242. The law is not necessarily inoperative *in toto* because in some of its provisions the legislature has exceeded its power. On the contrary, the rule is stated to be that the unconstitutionality of one portion of the statute cannot defeat other portions unless the nature of the unconstitutional provision is such as to render it of vital importance to the law. People *vs.* Mahaney, 13 Mich., 481. See also People *vs.* Richmond, 59 Mich., 570; Attorney General *vs.* Amos, 60 Mich., 372; Robison *vs.* Miner, 68 Mich., 549.

This general rule is conceded, but it is contended that this statute

furnishes evidence upon its face that it contains provisions which would not have been adopted had it been within the understanding of the legislature that the provision relative to the date for the meeting of electors was inoperative, the statute providing, as it does, that "in case two or more persons have an equal and the highest number of votes cast for any office created by this act, as canvassed by the board of State canvassers, the legislature in joint convention shall choose one of said persons to fill such office, and it shall be the duty of the governor to convene the legislature in special session immediately upon such determination
51 by said board of State canvassers." It is urged that if it had been understood that the legislature, which is to be chosen at the same general election at which the presidential electors are chosen, was to convene before the date when, under the law of Congress, the electors are permitted to cast their vote, that it is not to be presumed that the legislature would have provided for convening the legislature in special session at large expense. But we are not able to say, as matter of law, that this is true. The new legislature will sit but three legislative days prior to the date fixed by the law of Congress for the meeting of electors. Nor is it clear beyond question that it was not the purpose and intent of the members of the present legislature to retain the power of choosing the electors in case of tie rather than to commit it to their successors. We think there are evidences afforded by the act itself that such was their purpose. We cannot therefore say that this statute would not have been passed in the form in which it is without the provision relating to the time of the meeting of electors, and therefore are not justified in holding that the law is wholly inoperative because of the conflict of that provision with the law of Congress upon the same subject.

We have considered the questions presented with the care which the exceed-ng importance of the issue seemed to us to imperatively require, and our conclusion is that the statute must stand as the lawful edict of the legislature.

Nearly seventy years ago Chancellor Kent wrote in regard to the election of the President as follows: "The mode of his appointment presented one of the most difficult and moment-
52 ous questions that occupied the deliberations of the assembly which framed the Constitution, and if ever the tranquil-ity of this nation is to be disturbed and its liberties endangered by a struggle for power it will be upon this very subject of a choice of a President. This is the question that is eventually to test the goodness and try the strength of the Constitution, and if we shall be able for half a century hereafter to continue to elect the Chief Magistrate of the Union with discretion, moderation, and integrity, we shall undoubtedly stamp the highest value on our national character and recommend our republican institutions, if not to the imitation, yet certainly to the esteem and admiration of the more enlight-ned part of mankind." 1 Kent Com., 274.

The danger in this plenary power conferred by the constitution of the State upon its legislatures has been recognized by the wise and

patriotic statesmen of all political parties, and several attempts have been made in Congress to secure an amendment requiring a uniform mode.

The language of Chancellor Kent was written shortly after a long debate in the United States Senate over proposed amendments. Annals of Congress for 1823–'24, 167–375.

To the intelligence, wisdom, and patriotism of our people is due the gratifying fact that the danger has thus far been averted, but the action resulting in the passage of the act in question is a reminder of the danger which may at any time be precipitated upon the country for the purpose of obtaining political power.

The injustice of any other than a uniform system of electing the President of the United States is manifest. As has been re-
53 cently well said, "It is of the first and last consequence and importance that in legislating upon this subject it should not be regarded from a party standpoint." But neither the fact that this most important consideration may have been overlooked nor that this legislation may result in serious injustice can extend our jurisdiction or justify us in usurping functions which, under the Constitution, pertain to the legislature. As was said by Mr. Justice Cassody, in the recent case of State *vs.* Cunningham, 51 N. W. R., 1135: "It is to be remembered that even praiseworthy objects cannot be rightfully obtained by a violation of law. Every effort to fritter away the plain language of the Constitution, by way of construction or otherwise, even to secure a desirable end, is nothing less than an insidious attempt to undermine the fundamental law of the State, and hence to that extent destructive of good government, besides being vicious in its tendencies."

The writ should be denied.

R. M. MONTGOMERY.
CHAS. D. LONG.
ALLEN B. MORSE.
C. B. GRANT.
JOHN W. McGRATH.

(Endorsed:) Filed June 17, 1892. Chas. C. Hopkins, clerk supreme court.

54 *Judgment.*

At a session of the supreme court of the State of Michigan, held at the supreme court room, in the capitol, in the city of Lansing, on the seventeenth day of June, in the year of our Lord one thousand eight hundred and ninety-two.

Present: The Honorable Allen B. Morse, chief justice; John W. McGrath, Charles D. Long, Claudius B. Grant, Robert M. Montgomery, associate justices.

WILLIAM MCPHERSON, JR., and Others, Relators,
vs.
THE SECRETARY OF STATE OF THE STATE OF MICHIGAN, Respondent.

This cause having been heretofore duly heard upon the petition of the relators and the answer of the respondent and having been argued by counsel and due deliberation having been had thereon, and it appearing to the court that the writ of mandamus, as prayed for by relator-, ought not to be granted, the same is hereby denied.

55 *Petition for Allowance of Writ of Error.*

To the Honorable Allen B. Morse, chief justice of the supreme court of the State of Michigan:

And now come William McPherson, Junior, J. Henry Carstens, Henry A. Haigh, Jay A. Hubbel, Charles E. Hiscock, Otto Ihling, Philip T. Colgrove, Conrad G. Swensburg, James H. White, Fred. Slocum, Justus S. Stearns, John Millen, Julius T. Hannah, J. H. Comstock, petitioners, by Henry M. Duffield, their attorney, and complain that in the record and proceedings and also in the rendition of a judgment in a suit between William McPherson, Junior, J. Henry Carstens, Henry A. Haigh, Jay A. Hubbel, Charles E. Hiscock, Otto Ihling, Philip T. Colgrove, Conrad G. Swenburg, James H. White, Fred. Slocum, Justus S. Stearns, John Millen, Julius T. Hannah, J. H. Comstock, petitioners, and Robert R. Blacker, secretary of state of the State of Michigan, respondent, in the supreme court of the State of Michigan, being the highest court of law or equity of the said State in which a decision could be had in said suit, and in which a final judgment was rendered against them on the 17th day of June, 1892, in said suit, wherein was drawn in question the validity of a statute of said State of Michigan on the ground of its being repugnant to the Constitution and laws of the United States, and the decision was in favor of the validity of said statute, all which appears in the record and proceedings in said suit, manifest error hath happened, to the great damage of the said William McPherson, Junior, J. Henry Carstens, Henry A. Haigh, Jay A. Hubbell, Charles E. Hiscock, Otto Ihling, Philip T. Colgrove,
Conrad G. Swensburg, James H. White, Fred. Slocum, Justus
56 S. Stearns, John Millen, Julius T. Hannah, J. H. Comstock, petitioners—

Therefore they pray for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court of the United States.

HENRY M. DUFFIELD, *Attorney.*

57 [Endorsed:] 12774. Supreme court. Wm. McPherson, Jr., *et al. vs.* Robert R. Blacker, sec'y of state. Petition for allowance of writ of error. Filed June 30, 1892. Chas. C. Hopkins, clerk supreme court.

58 *Bond.*

Supreme Court of the United States.

WILLIAM MCPHERSON, J. HENRY CARSTENS, HENRY A. HAIGH, JAY A. Hubbell, Charles E. Hiscock, Otto Ihling, Philip T. Colgrove, Conrad G. Swensburg, James H. White, Fred. Slocum, Justus S. Stearns, John Millen, Julius T. Hannah, J. H. Comstock, Petitioners,

vs.

ROBERT R. BLACKER, Secretary of State of the State of Michigan, Respondent.

Know all men by these presents that we, Henry A. Haigh and Henry M. Duffield, of Detroit, are held and firmly bound unto Robert R. Blacker, secretary of state of the State of Michigan, in the sum of one thousand dollars ($1,000.00), to be paid to the said Robert R. Blacker, secretary of state of the State of Michigan, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 30th day of June, 1892.

Whereas the above-named William McPherson, J. Henry Carstens, Henry A. Haigh, Jay A. Hubbell, Charles E. Hiscock, Otto Ihling, Philip T. Colgrove, Conrad G. Swensberg, James H. White, Fred. Slocum, Justus S. Stearns, John Millen, Julius T. Hannah, and J. H. Comstock, petitioners, have prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court
59 of the State of Michigan:

Now, therefore, the condition of this obligation is such that if the above-named William McPherson, J. Henry Carstens, Henry A. Haigh, Jay A. Hubbell, Charles E. Hiscock, Otto Ihling, Philip T. Colgrove, Conrad G. Swensberg, James H. White, Fred. Slocum, Justus S. Stearns, John Millen, Julius T. Hannah, and J. H. Comstock, petitioners, shall prosecute their said writ of error to effect and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

HENRY M. DUFFIELD. [SEAL.]
HENRY A. HAIGH. [SEAL.]

Sealed and delivered in presence of—

STATE OF MICHIGAN, }
Eastern District of Michigan, County of Wayne, } *ss:*

Henry A. Haigh and Henry M. Duffield, being each duly sworn, depose and say and each for himself saith that he is worth the sum

of one thousand dollars ($1,000) over and above all his just debts and liabilities,

HENRY M. DUFFIELD.
HENRY A. HAIGH.

Sworn to before me this 29th day of June, 1892.

60 ANNA M. GRIFFIN,
Notary Public, Wayne County, Michigan.

Approved June 30, 1892.

ALLEN B. MORSE,
Chief Justice.

Endorsed: Filed Jun- 30, 1892. Chas. C. Hopkins, clerk supreme court.

61 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Robert R. Blacker, secretary of state of the State of Michigan, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Michigan, wherein Wm. McPherson, Jr., J. Henry Carstens, Henry A. Haigh, Jay A. Hubbell, Charles E. Hiscock, Otto Ihling, James H. White, Philip T. Colgrove, Conrad G. Swensburg, Fred. Slocum, Justus S. Stearns, John Millen, Julius T. Hannah, and J. H. Comstock — plaintiffs in error and you are defendant in error, to show cause, if any there be, why the final order and judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Allen B. Morse, chief justice of the supreme court of the State of Michigan, this 30th day of June, in the year of our Lord one thousand eight hundred and ninety-two.

[Seal of the Supreme Court of Michigan, Lansing.]

ALLEN B. MORSE,
Chief Justice Supreme Court Mich.

62 [Endorsed:] Filed Sept. 6, 1892. Chas. C. Hopkins, clerk supreme court.

STATE OF MICHIGAN, } *ss:*
County of Ingham, }

On this sixth day of September, in the year of our Lord one thousand eight hundred and ninety-two, personally appeared Joseph H. Dunnebacke before me, the subscriber, clerk of the supreme court of the State of Michigan, and makes oath that he served the within citation upon A. A. Ellis, attorney general of the State of Michigan,

by delivering a true copy of the same to him in person at his office, in the city of Lansing, in said county and State, on the 6th day of September, A. D. 1892.

JOS. H. DUNNEBACKE.

Sworn to and subscribed the sixth day of September, A. D. 1892, before me.

[Seal of the Supreme Court of Michigan, Lansing.]

CHAS. C. HOPKINS,
Clerk Supreme Court of the State of Michigan.

63 *Calendar Entries.* 12774.

Parties.	Relators' attorneys.	Respondents' attorneys.
William McPherson, Jr., and others, relators, *vs.* Secretary of State of the State of Michigan, respondent.	Henry M. Duffield. F. A. Baker, of counsel. Mandamus.	A. A. Ellis, att'y gen'l. John W. Champlin. Otto Kirchner, Thos. E. Barkworth, Of counsel.

Journal.	Date.	Proceedings.
	1892.	
	May 2	Petition filed.
K 474	" 3	Order allowed, returnable May 12, 2 p. m.
	" 12	Answer filed.
" 517	" 19	Order entered amending answer.
" 518	" 19	Argued and submitted.
" 564	June 17	Writ denied; opinion filed.
	" 30	Petition for allowance of writ of error filed.
	" 30	Bond, duly approved, filed.
	July 7	Writ of error received and filed.
	Sept. 6	Citation with proof of service filed.
	" 7	Return made to Supreme Court at Washington.

64 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Michigan, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court of Michigan, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between William McPherson, Junior, J. Henry Carstens, Henry A. Haigh, Jay A. Hubbell, Charles E. Hiscock, Otto Ihling, Philip T. Colgrove, Conrad G. Swensburg, James H. White, Fred. Slocum, Justus S. Stearns, John Millen, Julius T. Hannah, J. H. Comstock, petitioners, and Robert R. Blacker, secretary of state of the State of Michigan, respondent, wherein was drawn in question the validity of a statute of said State on the ground of it- being repugnant to the Con-

stitution and laws of the United States and the decision was in favor of the validity of such statute, a manifest error hath happened, to the great damage of the said William McPherson, Junior, J. Henry Carstens, Henry A. Haigh, Jay A. Hubbell, Charles E. Hiscock, Otto Ihling, Philip T. Colgrove, Conrad G. Swensburg, James H. White, Fred. Slocum, Justus S. Stearns, John Millen, Julius T. Hannah, J. H. Comstock, petitioners, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all
65 things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 30th day of June, in the year of our Lord one thousand eight hundred and ninety-two.

Seal of the Circuit Court, Eastern District of Michigan.

WALTER S. HARSHA,
Clerk of the Circuit Court of the United States for the Eastern District of Michigan.

Allowed by—
ALLEN B. MORSE,
Chief Justice Supreme Court Mich.

66 [Endorsed:] 12774. In Supreme Court of the United States. Wm. McPherson, Jr., *et al. vs.* Robert R. Blacker, sec'y of state. Writ of error. Filed July 7, 1892. Chas. C. Hopkins, clerk supreme court of Michigan. Henry M. Duffield, att'y for pl'ff in error.

67 STATE OF MICHIGAN:

In the Supreme Court.

WILLIAM MCPHERSON, JR., J. HENRY CARSTENS, HENRY A. HAIGH, Jay A. Hubbell, Charles E. Hiscock, Otto Ihling, Philip T. Colgrove, Conrad G. Swensburg, James H. White, Fred. Slocum, Justus S. Stearns, John Millen, Julius T. Hannah, and J. H. Comstock, Relators,

vs.

ROBERT R. BLACKER, Secretary of State of the State of Michigan, Respondent.

I, Charles C. Hopkins, clerk of the supreme court of the State of Michigan, do hereby certify that the annexed and foregoing is a

true and correct copy of the record and of all proceedings had and entered in the above-entitled cause by said court, including the written decision and reasons therefor, signed by the judges of said court, and filed in my office, as appears of record and on file in my office; that I have compared the same with the original and it is a true transcript therefrom and of the whole thereof; that attached thereto are the writ of error, with allowance endorsed thereon, the petition on which said writ of error was allowed, the citation, with proof of service endorsed thereon, and a copy of the bond to the adverse party filed with the writ of error.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court, at Lansing, this seventh day of September, in the year of our Lord one thousand eight hundred and ninety-two.

Seal of the Supreme Court of Michigan, Lansing.

CHAS. C. HOPKINS,
Clerk of the Supreme Court of the State of Michigan.

Endorsed on cover: Case No. 15,140. Michigan supreme court. Term No., 1170. William McPherson, Junior, J. Henry Carstens, *et al.*, plaintiffs in error, *vs.* Robert R. Blacker, secretary of state of the State of Michigan. Filed September 16th, 1892.

Office Supreme Court U. S.
FILED.
SEP 23 1892
JAMES H. McKENNEY.

CASE No. 15,140.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

Term No., 1170.

WILLIAM McPHERSON, JR., ET AL., PLAINTIFFS IN ERROR,

vs.

ROBERT R. BLACKER, SECRETARY OF STATE OF THE STATE OF MICHIGAN, DEFENDANT IN ERROR,

Error to the Supreme Court of the State of Michigan.

Brief of Henry M. Duffield, for Plaintiffs in Error.

JUDD & DETWEILER, PRS., WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

Term No., 1170.

THE PEOPLE EX REL. WILLIAM McPHERSON, JR., PLAINTIFFS IN ERROR,

vs.

ROBERT R. BLACKER, SECRETARY OF STATE OF THE STATE OF MICHIGAN, DEFENDANT IN ERROR,

Error to the Supreme Court of the State of Michigan.—Application for a Writ of Mandamus.

BRIEF FOR PLAINTIFFS IN ERROR.

Statement of Case.

Howell's Annotated Statutes of Michigan, § 240, vol. 1, p. 151, provides "that at the general election next preceding the choice of President and Vice-President of the United States there shall be elected by general ticket as many electors of President and Vice-President as the State may

be entitled to elect of Senators and Representatives in Congress."

Howell's Annotated Statutes of Michigan, § 147, vol. 1, p. 133, provides: "The Secretary of State shall, between the first day of July and the first day of September preceding a general election, direct and cause to be delivered to the sheriff of each county in this State a notice in writing that at the next general election there will be chosen as many of the following officers as are to be elected at such general election, viz: A governor, lieutenant governor, secretary of state, State treasurer, auditor general, attorney general, superintendent of public instruction, commissioner of the State land office, members of the State board of education, electors of President and Vice-President of the United States, and a representative in Congress for the district to which each of such counties shall belong."

The relators are the duly nominated candidates of the Republican party of Michigan for the office of electors of President and Vice-President of the United States. They claim the right to be voted for in the State at large on a general ticket. They applied to the secretary of state of Michigan to issue, within the time prescribed by law, the notice to that effect, and he refused. He based his refusal upon act No. 50 of the public acts of 1891.

Said act No. 50 provided that one elector of President and Vice-President of the United States and one alternate elector of President and Vice-President of the United States should be elected by the electors of each of the two so-called electoral districts at large established by said act, to be known and designated on the ballots respectively as "eastern district elector of President and Vice-President of the United

States at large" and "western district elector of President and Vice-President of the United States at large," and also that there should be elected by the electors in each congressional district into which the State is or shall be divided one "elector of President and Vice-President" and one alternate elector of President and Vice-President, the ballots for whom should designate the number of the congressional district and the persons to be voted for therein as "district elector and alternate district elector of President of the United States respectively." Said act No. 50 also provided for other proceedings respecting the election of electors of President and Vice-President of the United States, which will be more particularly pointed out hereafter, and which are in conflict with the Constitution of the United States and the acts of Congress passed in pursuance thereof, and which prescribe the duties of such electors in a manner at variance with and repugnant to the Constitution and laws of the United States.

The plain purpose of the act is to prevent the people of the State of Michigan as a whole from expressing the choice of the State in the coming presidential election. To this end the act divides the State, first, into electoral districts at large, and, second, into congressional districts.

It emasculates the State. It dethrones the State. Under its operation Michigan as a State will have no voice or place in the electoral college; and so cleverly have the districts been gerrymandered in the act that under its operation it is possible that a majority of the electors from Michigan may record a vote which will be in opposition to the choice of a majority of the voters of the State. Apparently with the view of accomplishing this result the act, in direct opposi-

tion to the express terms of the act of Congress of February 3, 1887, fixes the day for the meeting of the electors on the first Wednesday of December instead of the second Monday in January following the election, and confers upon the existing legislature the right to decide a tie vote, whereas at the date of meeting fixed by the act of Congress a new legislature elected at the presidential election will be in session and a new State administration elected at the same time will have been installed.

Attached to this brief are copies of said act No. 50 and act No. 168, Public Acts of Michigan, 1891, prescribing the boundaries of the congressional districts, and copies of sections 147 and 240 of Howell's Annotated Statutes of Michigan.

Plaintiffs in error, upon the refusal of defendant in error, applied to the supreme court of the State for a mandamus upon the defendant in error as secretary of state to compel him or his official deputy to direct and cause to be delivered to the sheriff of each county in this State the notice required by said section 147 of Howell's Annotated Statutes.

They claimed, among other reasons, that act No. 50 of the Public Acts of 1891, of Michigan, was void and of no effect, because—

1st. It contravened and was repugnant to article II, section 1, clause 2, of the Constitution of the United States.

2d. It contravened and was repugnant to the fourteenth amendment to the Constitution of the United States.

3d. It was in direct contradiction of and opposition to the act of Congress of February 3, 1887.

Supplement to U. S. Revised Statutes, vol. 1, 2d edition, pp. 525 to 527.

The supreme court of Michigan overruled these objections, decided that act No. 50 was a valid law, and denied the petition of the plaintiffs in error, who bring the case here by writ of error.

The opinion of the State court is reported in 52 Northwestern, p. 469.

Assignment of Errors.

The plaintiffs in error assign error as follows:

The judgment of the supreme court of Michigan was erroneous in deciding that act No. 50 of the Public Acts of Michigan of 1891 was a valid law and not repugnant to the Constitution of the United States or to the 14th amendment thereto and was not in conflict with the act of Congress of February 3, 1887.

Brief.

The State court held that the relators were the proper persons to make the application, and that the same was not premature, and this will, we think, be conceded in this Court.

That it is the duty of the secretary of state, under the laws of Michigan (Howell's Annotated Statutes, sections 147 and 240), to issue the notices requested if act No. 50 of the Public Acts of 1891 is unconstitutional and void needs no argument. Some objections to the act were made and argued in the State court, which involved no Federal question, but the only questions which are here debatable are:

1. Does the act contravene and is it repugnant to article II, section 1, clause 2, of the Constitution of the United States?

2. Does the act contravene and was it repugnant to the fourteenth amendment to the Constitution of the United States?

3. Is the act in contradiction of and opposition to the act of Congress of February 3, 1887?

I.

The Act is in conflict with Article II, Section 1, Clause 2, of the Constitution of the United States.

This provides—

"That each State shall appoint * * * a number of electors of President and Vice-President of the United States equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress."

It also provides that their appointment shall be "made in such manner as the legislature thereof may direct."

In legal effect it commands the State to "appoint" the electors, and delegates to the legislature the power to "direct" the manner of their appointment.

The clause imposes one duty on the State and another on the legislature.

The relators contend that the words "the State," as thus used, mean the artificial being, the legal entity, the body politic, which is the sovereign State.

The opposite contention must necessarily be that the word "State" means either the territory or area of the State or the people of the State or the voters of the State. Which is correct?

Immediately preceding the present use of the word in the Constitution it had been repeatedly employed to designate the State in its sovereign capacity.

Article I, section 10, clause 1: "No State shall enter into any treaty, alliance of confederation," etc.

Clause 2: "No State shall, without the consent of the United States, lay any imports of duties," etc.; again: "And

the net produce of all duties and imports laid by any State," etc.

Clause 3: "No State shall, without the consent of Congress, lay any duty of tonnage."

Similar uses of the term in other parts of the Constitution suggest themselves, as article III, section 2, that "the judicial power shall extend to controversies between two or more States, * * * between a State and the citizens of another State, * * * between a State or the citizens thereof and foreign states, citizens, or subjects."

Article IV, section 3: "New States may be admitted into this Union."

Whenever the Constitution confers any power on or reserves any right to the people of the States or to any State functionaries, it is careful to so declare explicitly, as in the case of article 1, section 2, for choosing representatives in Congress by the "people of the several States;"

Article I, section 3: choosing United States Senators "by the legislature" of the State.

Article IV, section 2: "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

Article V: "On the application of the legislatures of two-thirds of the several States Congress shall call a convention for proposing amendments to the Constitution."

Finally, the 10th amendment provides "that the powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved respectively to the States or the people."

Strong support of this contention that the State must appoint its presidential electors is found in the third and im-

mediately succeeding clause of the same section afterwards superseded by the twelfth amendment, which provided that when the election of President is cast upon the House of Representatives "The votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States and a majority of all the States shall be necessary to a choice."

Nor are judicial interpretations lacking to sustain this view.

As early as the case of *Hepburn* vs. *Ellzey*, in 2d Cranch., 445, where the question was whether a citizen of the District of Columbia could maintain an action in the Federal court of Virginia against a citizen of that State, the Supreme Court of the United States held, Marshall, chief justice, delivering the opinion of the Court, "That the members of the American Confederacy only are the States contemplated in the Constitution." He cites the provisions of the United States Constitution for the composition of the House of Representatives and of the Senate, and cites as an instance of this specific use of the term, "Each State shall appoint for the election of the executive a board of electors equal to its whole number of Senators and Representatives."

"These clauses show that the word 'State' is used in the Constitution as designating a member of the Union, and excludes from the term the significance attached to it by writers on the law of nations. When the same term which has been used plainly in this limited sense in the articles respecting the legislative and executive departments is also employed in that which respects the judicial department, it must be understood as retaining the sense originally given to it."

In the prior case of Penhallow *vs.* Doane's Administrators, 3d Dallas, p. 54, Mr. Justice Iredell, speaking for the court, says:

"A distinction was taken at the bar between a State and the people of the State. It is a distinction I am not capable of comprehending. By a State forming a republic, speaking of it as a moral person, I do not mean the legislature of the State, the executive of the State, or the judiciary, but all the citizens which compose that State, and are, if I may so express myself, integral parts of it together forming a body politic." P. 93.

Further on in the opinion he says:

"I conclude, therefore, that every particle of authority which originally resided either in Congress or in any branch of the State Government was derived from the people who were permanent inhabitants of each province in the first instance and afterwards became citizens of each State; that this authority was conveyed by each body politic separately, and not by all the people in the several provinces or States jointly."

The Supreme Court of the United States, in the case of *Ware* vs. *Hylton*, 3d Dallas, 225, decided "that from the date of this Declaration of Independence the United States were *de facto* as well as *de jure* in the possession and actual exercise of all the rights of independent governments."

In *Buckner* vs. *Finley*, 2d Peters, 586, Mr. Justice Washington cites with approval the statement, in the opinion of the court of appeals in Virginia, "that though they (the State) formed a Confederate government, yet the several States retain their individual sovereignty, and, with respect to their municipal regulations, are, to each other, foreign."

In the case of *Texas* vs. *White*, 7th Wall, p. 700, where the question was whether the title of a purchaser of United States bonds issued payable to the State of Texas or bearer and alienated during the rebellion by the insurgent government after the day at which the bonds became redeemable was affected with notice of defect of title in the seller, the Supreme Court of the United States again considered the interpretation to be given to the word "State" as used in the provisions of the Federal Constitution respecting the judicial power of the courts of the United States; and in the opinion of the court, delivered by Chief Justice Chase, it is thus defined:

"A State, in the ordinary sense of the Constitution, is a political community of free citizens occupying a territory of definite boundaries and organized under the Government's sanction and limited by a written constitution and established by the consent of the governed. It is the union of such States under the common Constitution which forms the distinct and greater political union, which that Constitution designates as the United States, and makes of the people and States composing it one people and one country."

The learned Justice cites as instances of this use the prohibition upon the States in respect to the making of treaties, emitting bills of credit, laying tonnage duties, and guaranteeing to the State's representation in the House of Representatives and in the Senate, and says:

"And there are instances in which the principal sense of the word seems to be that primary one to which we have alluded, of a people or political community, as distinguished from a government.

"In this latter sense the word seems to be used in the

clause which provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion.

"In this clause a plain distinction is made between a State and the government of a State."

In the letter from Mr. Madison to Mr. Everett cited by Judge Cooley in his note to Story on the Constitution, vol. 1, p. 89, the eminent writer says:

"It (the Constitution of the United States) is formed by the States—that is, by the people in each of the States acting in the highest sovereign capacity—and formed consequently by the same authority which formed the State Constitution, * * * and being a compact among the States in their highest sovereign capacity, * * * it cannot be altered or annulled at the will of the States, as the constitution of a State may be at its individual will."

The Declaration of Independence, appealing to the supreme judge of the world, declares and publishes "that these United Colonies are and of right ought to be free and independent States, and that as free and independent States they have full power to do all acts and things which independent States might by right do."

In the face of these provisions the contention is made that "the State" need not appoint the electors, but that they may be appointed by fractions of the territory of the State and by the votes of parts of its electors.

It is worthy of note that nowhere in the Constitution is any reference made to "districts," either congressional or otherwise. The earliest allusion to districts in Federal legislation, I think, was in the act of Congress of 1842, 5 U. S. St.,

591, which required, for the first time in the history of the country, the election of members of Congress by districts.

If the questions involved in the construction of this clause of the Constitution were not of such paramount importance it would seem unnecessary to further discuss the point.

What the Constitution meant was the sovereign State, a legal although an artificial being, a great political corporation with imperial prerogatives and powers, the great State, the State that in the minds of many of the men of the convention which framed the Constitution was greater almost than the United States; the State of whose proper sovereignty they would not give up one jot or tittle; a State which has a great seal; which has a seat of government; which has a system of courts to decide any controversy concerning an appointment; which has a military and civil power; which can record its decree, and which from its high plane of sovereignty can command respect for its choice, and if its choice is not respected can command obedience to its will.

But it is said that this second clause of article II, section 1, of the Constitution provides that this appointment shall be made "in such manner as the legislature may direct," and it is claimed that these words are so plenary as to permit the legislature to take this great power from the sovereign State and cutting it up divide it among fourteen disjointed fractions of the territory of the State, each of which shall choose one elector of President and Vice-President of the United States.

In other words, that under the form of prescribing the manner in which the State shall appoint the legislature may deprive the State of all appointing power.

In Towle's "History and Analysis of the Constitution" the journal of the constitutional convention is given separately in connection with each article and each clause, and this article comes on page 161.

It appears from the discussion of this article in the convention that the first idea was that the legislature should elect the President, and by the legislature was meant Congress and not the legislatures of the States. Then it was thought that the executive would be too much under the control of the legislature if the power was left there, and Mr. Wilson, of Pennsylvania, moved that the executive magistrate should be elected by electors to be chosen by the people in the prescribed election districts, and that, I think, is the first mention in the debates on the Constitution of electors with reference to choosing President and Vice-President. It was supported by two States, Pennsylvania and Maryland. The other eight States voted against it.

Is it not significant that in the whole proceedings of the convention which adopted this Constitution nothing whatever was done by districts, nothing whatever was done by the people, nothing whatever was done by the legislatures of the States, but every vote recorded the vote of a State—just such a State as we are now contending here should appoint these electors. Those States and that kind of a State formed the Constitution, and those States and that kind of a State the Constitution meant when it declared "each State shall appoint electors."

After that the plan of election by the national legislature seems to have carried, but it was rescinded. Gouverneur Morris moved to strike out the national legislature and insert citizens of the United States so as to provide for

the choice of President by the popular vote. Pennsylvania alone supported this motion. Then after some further discussion Gouverneur Morris expressed strong opposition to the election of the President by the legislature (meaning the national legislature) and proposed to substitute, "Who shall be chosen by electors to be chosen by the people of the several States," and that was disagreed to—yeas, 5; noes, 6. Finally it was adopted in its present form.

So that the question *who should appoint* electors of President and Vice-President of the United States was debated in that convention, whether the citizens of the United States, whether the national legislature, whether the legislatures of the various States, or whether the electors in separate districts, and the whole subject was left, very wisely, by the national convention to the various States, saying that they, the States, should appoint in such manner as the several legislatures thereof should direct.

The Constitution makes it the duty "of the State to appoint * * * a number of electors of President and Vice-President of the United States equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress." This clearly means that the State shall appoint all the electors.

Under the respondent's theory the clause should read, "There shall be appointed *from each State* in such manner as the legislature thereof may direct a number of electors equal," etc. This is the construction—based upon the assumption that the framers of the Constitution chose their words so loosely—which counsel ask to be put upon a clause in the Constitution of the United States—the greatest instrument in the history of human liberty; the most far-reach-

ing in its purposes; the most prescient and provident in its details; the lucidity and perspicuity of which has challenged the admiration of all the nations of the earth.

And it is contended that the legislature may cut the State up into fractions; may parcel out the voters among the various districts as they see fit, and have those voters elect an elector, and that this will be an appointment by the State.

To illustrate, if a law of a State authorizes a church to elect so many members of the session of the church in such manner as the board of trustees may direct, that the board of trustees can take the holders of pews on the right-hand side of the center aisle and give to them the right to elect so many members of the session, and to the holders of pews between the right-hand aisle and the wall so many more, and so on in reference to the left-hand side, so that the pew-holders in each portion of the church should choose an allotted number of members of the session, and that all the members thus chosen should be the choice of the church, I take it that in such a case if any pew-holder who sat in one of those sections of the church should come into this Court and say, "When the law says this church shall appoint its session it means the church as a whole, the church as a corporation—it does not mean the sections or pews or parts of the church or the particular place in which some of its members sit," that this Court would say, although the board of trustees have the right to direct the manner in which that selection or appointment may be made by the church, yet the board of trustees have no right to take from the church the right of appointment of all the members of

the session or split it up and give different parcels of it to different pew-holders in different portions of the church.

The attorney general of Michigan, in his brief for the defendant in error in the supreme court of Michigan, quoted from Justices Pinckney and Story and also from the opinions of Justices Miller, Bradley, Story, Field, and others in the electoral commission case in support, as he claimed, of his proposition that the legislature "have absolute control of the appointments." We submit that he is mistaken in the construction he puts upon these quotations. In every case the distinction between the power of the State and the power of the legislature—the power of appointment and the power to prescribe the method of appointment—is clearly expressed. I quote a few examples: Mr. Justice Miller says, vol. 5, part 4, 44 Congressional Record, 2d session electoral commission, p. 256:

"The first of these acts or functions (the appointment of electors) belongs by the Constitution wholly to the States," "who shall appoint in such manner as the legislature thereof may direct the number of electors to which the State is entitled."

Mr. Justice Field, *id.*, 245:

"The Constitution declares that each State shall appoint electors in such manner as the legislature may direct. * * * The power of choice on the part of the State is unrestricted. The manner of appointment is left entirely to the legislature."

Commissioner Hunton, *id.*, 222:

"It is conceded that the power to appoint belongs to the State."

Commissioner Hoar, *id.*, 240:

"Upon the whole matter thereof I am of opinion that the appointment of electors * * * is the sole and exclusive prerogative of the States."

Mr. Justice Bradley said, *id.*, p. 260:

"Each State has a just right to have the entire and exclusive control of its own vote for the chief magistrate and the head of the republic without any interference on the part of any other State acting separately or in connection with others. If there is any State right of which it is and should be more jealous than any other it is this; and such seems to be the spirit manifested by the framers of the Constitution. This is evidenced by the terms in which the mode of choosing the President and Vice-President is expressed: 'Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress, but no Senator or Representative or person holding an office of trust or profit under the United States shall be appointed an elector. The electors shall meet in their respective States and vote by ballot,' etc. Almost every clause here is fraught with the sentiment to which I have alluded."

Under the construction contended for by counsel for defendant in error it is impossible to see why the State was mentioned in this clause of the Constitution if the legislature has the power to appoint and the State has no power to appoint. This construction would make the clause read, "the legislature shall appoint in such manner as they may direct." But the clause cannot be read in that way without leaving entirely out of it its first and most important words, "each State shall appoint."

Will the State of Michigan appoint electors under this act? Will the appointment by thirteen out of sixteen wards of the city of Detroit (the first electoral district) or by three wards of the city of Detroit, some of the townships of Wayne county and other counties (the sixth electoral district), with no autonomy, with no self-government, with no common head, with no power even to record their own action, with not even a common seal, with no authority to compel the obedience of any one, with not the first shred or attribute of sovereignty, and which are in no sense united, except that their territory is contiguous, be an appointment by the sovereign State of Michigan?

Contemporaneous Construction.

The supreme court of the State of Michigan, "admitting that if the question were to be determined solely by reference to the language employed there would be much force in the contention that the State must act as a unit, and that no lesser body could be delegated to perform any portion of the duty vested in the State body corporate, and that it might possibly be held that the words 'in such manner as the legislature thereof may direct' confer only the limited power of directing how the State acting as an entirety shall make its appointment," held that the case was a proper one in which to have resort to contemporaneous construction, and reached the conclusion that such contemporaneous construction settled the legality of district electors.

We submit, with great deference, that the learned court was in error in this respect. First, we insist that the language of the Constitution is so plain, clear, and determinate

that it requires no interpretation; and, secondly, there has in fact been no such contemporaneous construction.

The rule is clearly stated by Mr. Justice Story:

"In construing the Constitution of the United States we are, in the first instance, to consider what are its nature and objects, its scope and design, as apparent from the structure of the instrument, viewed as a whole and also viewed in its component parts. Where its words are plain, clear, and determinate they require no interpretation and it should therefore be admitted, if at all, with great caution, and only from necessity either to escape some absurd consequence or to guard against some fatal evil. Where the words admit of two senses, each of which is conformable to common usage, that sense is to be adopted which, without departing from the literal import of the words, best harmonizes with the nature and objects, scope and design, of the instrument.

"Contemporary construction is properly resorted to—to illustrate and confirm the text, to explain a doubtful phrase, or to expound an obscure clause; and in proportion to the uniformity and universality of that construction and the known ability and talents of those by whom it was given is the credit to which it is entitled. It can never abrogate the text, it can never fritter away its obvious sense, it can never narrow down its true limitations, it can never enlarge its natural boundaries. We shall have abundant reason hereafter to observe when we enter upon the analysis of the particular clauses of the Constitution how many loose interpretations and plausible conjectures were hazarded at an early period, which have since silently died away and are now retained in no living memory as a topic either of praise or blame, of alarm or congratulation."

The mere fact that among the variant methods of appointing Presidential electors which came into practice a few years after the adoption of the Constitution a few of the

States did for a time choose electors by districts is not evidence of any such contemporaneous construction as should conclude the court from giving the true and plain exposition of the text.

On the contrary, the fact, which is historical, that all the States which had originally adopted a district system soon abandoned it, and that as early as 1834 presidential electors in every State in the Union were appointed by the State, being chosen either by the popular vote or by the legislature, *is evidence* that the real contemporaneous construction of this provision was adverse to the district plan.

It is stated in McMasters' History of the People of the United States, volume 1, page 525, that at the first election of President all of the States chose their presidential electors by a direct vote of the people or by the legislature. These elections were held on the first Wednesday of January, 1789. New York could not agree on a mode of choice and lost her vote. There was a less serious quarrel in New Hampshire. The senate claimed the right to negative the choice of the house in the selection of electors, but the assembly yielded, and toward midnight, entering a solemn protest, chose electors. "The most exciting election was perhaps in Maryland. There the choice of electors was with the people, and, the State being much given to anti-Federalism and paper money, two tickets were soon before the voters." (McMasters, *ibid*, page 526.)

In Virginia also the choice was with the people. In Massachusetts two electors were chosen at large, eight more were elected by the people. Each district elected three and the legislature chose from them. Elsewhere the election was by the legislature; in some States by a joint ballot,

in others by a concurrent vote of both branches of the legislature. (McMasters, vol. 1, p. 526.)

At the succeeding election in 1792 Virginia voted for the electors at large. They were selected from districts, but voted for at large. New York had still delayed making any law for appointing her electors until it was too late to enact any general law, and to save her vote she passed a special act for the choice of electors by the legislature. Maryland was divided into six districts, and from each district an elector was chosen but the people voted for all the electors, so that at the second election of President of the United States none of the original thirteen States elected electors of President and Vice-President of the United States by districts.

In 1796, at the third election, the course pursued was the same, except that Maryland was divided into ten districts. (McMasters, vol. 2, pp. 306, '7.)

In 1800 the trouble began. Party strife ran high. The Federalists began to lose power, and the Republicans were coming into power, largely through the extreme popularity in New York of one of their members. At once the district plan is brought into play in case it will help the Federalists, and again abandoned in case that course will help the Federalists. In Pennsylvania, which had always previously chosen its electors by general ticket, the legislature, after great contention, rejected a vote to district the State. In 2 McMasters, 509, a very graphic account is given of the bitter contest in this State.

In Maryland the Republicans claimed that they would have elected another elector if the Federalists had not set fire to the woods on election day and so kept the farmers from the polls. (2 McMasters, p. 509.)

In New York the Republicans and Federalists were in conflict, and it is stated in Henry Cabot Lodge's "Life of Hamilton" to have been the great mistake of Hamilton's life that after having argued against and defeated a bill to divide the State of New York into districts for the election of electors for President and Vice-President, afterwards, when the Republicans came into power, he urged Jay to allow the legislature to pass such a law because it would help his party.

In 1804 there was great strife in Massachusetts over the mode of choosing electors. The Federalists repealed the law for the choice of electors. (McMasters, vol. 3, p. 188.)

This continued excitement soon made its mark upon legislation. Eight States in 1804 had changed their mode of choosing electors: Pennsylvania from legislative to general ticket; New Jersey from legislative to general ticket; Maryland amended her constitution so as to guarantee to white citizens properly qualified the right to vote for electors of President and Vice-President; Massachusetts changed from districts to legislature; Virginia from districts to general ticket; North Carolina from legislature to districts; Kentucky from four districts to two districts; Tennessee from State plan to five districts, and henceforth varying modes of choosing electors prevailed in different States until 1834, when Maryland adopted a plan of election by popular vote on general ticket, which left only South Carolina to choose her electors by legislature.

When party feeling ran so high as this, when Federalist senators in Pennsylvania were warned "that threats had been made by Republicans that they would be put out of

the way, to keep in doors at night for fear harm would come to them, to be cautious when a stranger approaches" (2 McMasters, p. 509), it was no time for people to sit calmly down and construe the Constitution of the United States. Whatever legislation took place then was the legislation of partisan heat and excitement and should have no more weight with a court as a construction of the Constitution than the law that we are discussing should have weight, for the legislation then was prompted by and born of the very same spirit of which this law is born, a mad desire for temporary power.

II.

The Act is in Violation of the Fourteenth Amendment to the Constitution of the United States.

The opinion of the State supreme court disposed of the argument under the fourteenth amendment by saying, first, that the contention of the plaintiffs in error is a strained construction of the amendment; and, secondly, that the report of the Senate Committee of Privileges and Elections in 1874 and the opinions of the commissioners in the Electoral Commission in 1877 furnish a contemporaneous construction of the amendment in opposition to that contention. It is to be regretted that the learned judge who delivered the opinion of the court did not furnish any exposition of the true meaning of the amendment, or point out what privileges and immunities of citizens of the United States the amendment was intended to guarantee, or give a reason why the right to vote for President was not included among them, and explain of what right to vote for electors

of President and Vice-President of the United States the amendment prohibited a denial.

It is difficult to see how the Senate committee's report in 1874 or the opinions in the Electoral Commission case can be held to be a contemporaneous construction of the amendment. The report of a legislative committee is neither a law nor a judicial decision. In the case cited it was not approved by the body to which it was made. At best it is merely the opinion of the committee or more often the opinion only of the chairman of the committee. In the Electoral Commission case the mode of choosing presidential electors was not at issue, directly or indirectly, or in any way, shape, or manner. The certified electors and their respective contestants had been voted for in precisely the same manner. The scope of the amendment or its effect upon section 1 of article 2 never arose in the case. It could not have affected the title of any certified elector or the right of any contestant, because each claimed the office through the same election.

The sole question between them was who had received the most lawful votes.

After the adoption by every State in the Union of the manner of choosing all its presidential electors at a popular election the fourteenth amendment was adopted.

Florida had from her admission into the Union until her secession chosen her electors by a popular vote. She was reconstructed and readmitted in May, 1868, and, although as a temporary expedient she chose her electors that year by vote of her legislature, in reality she was no exception.

The State which had longest held to the district system was Maryland. In 1834 she adopted the plan of the popu-

lar vote, her legislature reciting in the preamble of the act that "the manner of appointing electors of President and Vice-President of the United States by a general ticket as directed by the legislatures of a large majority of the States * * * deprived the majority of the citizens of Maryland of their just weight in their choice of the Chief Magistrate."

The State which had longest held to the plan of choice by the legislature was South Carolina.

With this one exception, for more than thirty years preceding the adoption of the fourteenth amendment all the States in the Union had continuously and uninterruptedly chosen presidential electors by popular suffrage.

In South Carolina until the rebellion electors of President and Vice-President of the United States were appointed by the legislature by ballot on the Tuesday preceding the first Wednesday in December in every presidential year. (Laws of South Carolina, vol. 5, pp. 86 and 202.) This legislature was, however, chosen at a general election held in October, in the midst and almost at the close of a presidential campaign. It came fresh from the people and was chosen with reference to its exercise of this power of electing the presidential electors. Subsequent to the rebellion, on the 21st of December, 1865, the new reconstructed State of South Carolina adopted the mode of electing presidential electors by the popular vote upon a general ticket, the language of the act being, "shall be made in this State by the people of the State." (Statutes of South Carolina, vol. 13, p. 349.) This act, by section 9, repeals all laws having reference to the election of electors of President and Vice-President of the United States contrary to the provisions of this act.

A subsequent act, adopted on the 26th of September,

1868 (Constitution and Laws of South Carolina, 1868, p. 138), entitled "An act providing for the next general election and the manner of conducting the same," and the purpose of which was to provide by general law for the proceedings at all elections, contained the following provision:

SECTION 13. "There shall be one general ticket, on which shall be the names of the persons voted for as representatives in Congress and State, circuit, and county officers, and on another general ticket the names of the persons voted for as electors of President and Vice-President as hereinafter provided."

Section 23 provides "that the electors for President and Vice-President shall be chosen at the said election. The managers shall make a separate canvass and statement of the votes given for electors and attach thereto one original ballot of each kind found to have been given for electors."

The day before the passage of this act, namely, 25th of September, 1868, an act entitled "An act to provide for the formation and proceedings of the college of electors" was adopted.

Constitution and Laws of South Carolina, 1868, p. 111.

Thus as early as 1865 the last State in the Union to adopt the mode of choosing electors of President and Vice-President of the United States by popular suffrage had conformed to the practice in use for more than thirty years previous in all the other States.

At the time of the adoption of the fourteenth amendment in every State of the Union the male inhabitants thereof twenty-one years of age and citizens of the United

States, by express provision of law, possessed and exercised the right of voting at an election for the electors of President and Vice-President of the United States, and the right of voting for *all the electors of President and Vice-President* of the United States to which the State was entitled.

That this was a right and a privilege no one will deny; that it cannot be abridged by State legislation must be conceded. The only question that remains is, Does act No. 50 of the public acts of 1891 deprive any citizen of the United States of twenty-one years of age who is an inhabitant of Michigan of his right to vote for electors of President and Vice-President of the United States, or does it in any manner abridge this right?

Under the prior law every citizen of the United States who was a male inhabitant of Michigan and twenty-one years of age had the right to vote for as many electors of President and Vice-President as the State was entitled to elect of Senators and Representatives in Congress. At the coming election in Michigan that would be fourteen. Under act No. 50 no such citizen has the right to vote for more than two such electors. In other words, his right under the fourteenth amendment, if it is applicable, is to vote for fourteen electors of President and Vice-President, while under act No. 50 that right is so abridged that he can vote for but two. It is too plain for argument that if the amendment applies there is an abridgement, if not a denial, of this right.

The fourteenth amendment provides that "all persons born and naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and im-

munities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. Representatives shall be appointed among the several States according to their numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in Congress, the executive and judicial officers of the State or the members of the legislature thereof is denied to any of the male inhabitants of such State, being twenty-one years of age and citizens of the United States, or in any way abridged except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State."

This amendment is for the common benefit of all, white and black, of every race and previous condition. While the majority of the Court said in the Slaughter-House cases (16 Wall., p. 36) that the primary purpose and intention of the fourteenth amendment was to legislate and provide against discrimination against the negro, the Court has repeatedly held that the language of the amendment must be applied alike to all cases and to all classes of citizens.

Mr. Justice Miller, in the Slaughter-House cases, *ubi supra*, speaking for the Court, says:

"We do not say that no one else but the negro can share in this protection, but the language and spirit of these articles are to have their fair and just weight in any question of

protection. Undoubtedly, while negro slavery was in the minds of the Congress which proposed the thirteenth article, it forbids any other kind of slavery now or hereafter; * * * and so, if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection may apply, although the party may not be of African descent." * * *

In *Missouri* vs. *Lewis*, 101 U. S., p. 28, Mr. Justice Bradley, speaking for the Court, on p. 30, says:

"These are to extend United States citizenship to all natives and naturalized persons, and to prohibit the States from abridging their privileges or immunities or depriving any person of life, liberty, or property without due process of law, or denying to any person equal protection of the laws."

In the argument of the learned counsel for the plaintiff in error in that case the proposition is plainly stated that the parties claiming their constitutional right are as justly entitled to the protection as if they were of African descent; if not, they say, with convincing force, that amendment which sought to establish equality before the law establishes inequality by giving preference to the rights of the colored race and affording them superior protection. The weight of authority and sound reason seems to establish that, while the immediate action sought by the adoption of the amendment was the protection to the negro, its protection extends and inures to the common benefit of all.

Mr. Justice Field, in *Bartemeyer* vs. *Iowa*, 18 Wall., 140, says:

"The amendment was not, as held by the opinion of the

majority, primarily intended to confer citizenship on the negro race. It had a much broader purpose. It was intended to justify legislation extending the protection of the National Government over the common rights of all citizens of the United States."

The amendment is not confined to any class of rights or privileges and immunites; it includes all.

The amendment declares that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

That is, no State shall make any new law or enforce any existing law which shall abridge any privilege or immunity of any citizen of the United States.

In other words, the amendment does not guarantee to all citizens of the United States such privileges only as are enjoyed by women, minors, and idiots who may be citizens of the United States.

No State can abridge the privileges of an adult male citizen because they may include privileges which a married woman does not enjoy, nor those of a competent person because not possessed by an incompetent person.

In this connection it is significant that in case of *Minor* vs. *Happersett*, 21 Wall., 162, it was not claimed by counsel or intimated by the court that the amendment did not protect the privilege of voting where it existed. *Ex parte* Yarbrough, 110 U. S., p. 664, corrects a misapprehension by counsel of an expression in the above case that the Constitution of the United States does not confer the right of suffrage on any one.

The Court, speaking through Mr. Justice Miller in the Slaughter-House cases, says:

"The first section of the fourteenth article * * * opens with a definition of citizenship, not only citizenship of the United States but citizenship of the States. No such definition had been previously found in the Constitution, nor had any attempt been made to define it by act of Congress. * * * To remove this difficulty primarily and to establish a clear and comprehensive definition of citizenship, which should declare what would constitute citizenship of the United States and also citizenship of the States, the first clause of the first section was framed," quoting the clause: * * * "The language of the prohibition is: no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. It is remarkable, if this clause was intended as a protection of a citizen of a State against the legislative power of his own State, that the words 'citizen of a State' should be left out, when it is carefully used and used in contradistinction to 'citizens of the United States' in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose."

And Mr. Justice Field in *Bartemeyer* vs. *Iowa*, *ubi supra*, says:

"It therefore recognized, if it did not create, a national citizenship, and made all persons citizens except those who preferred to remain under the protection of a foreign government, and declared that the privileges and immunities, etc. This national citizenship is primary and not secondary."

To the same effect in his dissenting opinion in *Ex parte* Virginia, 102 U. S., p. 368.

In *U. S.* vs. *Cruickshank*, 92 U. S., p. 550, the Chief Justice, discussing the amendment, says:

"The people of the United States resident within any State are subject to two governments—one State, the other national. The citizen owes allegiance to two departments, so to speak, and within their respective spheres must pay the penalties which each exacts for disobedience to its laws. In return he can demand protection from each within its own jurisdiction."

Mr. Justice Bradley, in the Civil Rights cases, 109 U. S., p. 11, discussing the inhibition of the second clause, says:

"It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It qualifies and makes void all State legislation and State action of every kind which impairs the privileges and immunities of the citizens of the United States, or which injures them in life, liberty, or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but in order that the national will thus declared may not be a mere *brutum fulmen*, the last section of the amendment invests Congress with power to enforce it by appropriate legislation."

In support of our contention there is controlling significance in the double prohibition of State legislation.

The amendment does not stop with the prohibition upon the State from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States, but it continues: "nor shall any State deprive any person of life, liberty, or property without due

process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

This clause has been held by this Court in the cases above cited to include the pursuit of happiness.

It is not, therefore, the natural rights only of the citizens of the United States which are included in the privileges and immunities which the State must not abridge. These are saved from State interference and guaranteed to *all persons*, whether domestic citizens or foreigners. It is the immunities and privileges belonging to *citizens of the United States* which the State must not molest. These words, "citizens of the United States," it is said by Mr. Justice Miller in the passage above quoted, were adopted "understandingly and for a purpose."

The supreme court of California, in construing this clause of the amendment, says:

"The clause of the fourteenth amendment referred to did not create any new or substantive legal rights. * * * It, however, operated on them as it found them already established, and it declared, in substance, that such as they were in each State they should be held and enjoyed alike by all persons within its jurisdiction." (Ward *vs.* Flood, 48 Cal. R., p. 36.)

The opinion of this Court, on page 171 of 21 Wall., delivered by Chief Justice Chase, declared:

"The amendment did not add to the privileges and immunities of a citizen, but simply furnished an additional guarantee for the protection of such as he already had. No new voters were necessarily made by it. Indirectly it may have had that effect, because it may have increased the number of citizens en-

titled to suffrage under the constitution and laws of the State, but it operated for this purpose, if at all, through the States and the State law."

This was a case where a woman claimed the right under this amendment to vote. It is noteworthy that no one then claimed that the amendment did not protect her right, if she had any.

In Bradwell *vs.* State, 16 Wall., p. 139, Mr. Justice Miller said:

"We agree with him (counsel for plaintiff in error) that there are privileges and immunities belonging to citizens of the United States in that relation and character, and that it is these, and these alone, which a State is forbidden to abridge."

Is argument necessary to establish that the right to vote for electors of President and Vice-President of the United States, whether existing at the time of the adoption of the amendment or conferred by the amendment itself, was and is a privilege of a citizen of the United States?

Under a republican form of government, what higher privilege has any adult male citizen than the right to vote for the Chief Magistrate of the nation? What greater immunity can he ask? What is there that he would sooner ask immunity for under this clause than immunity from partisan legislation abridging his rights as an elector and a voter?

Take away the citizen's right to vote and you take away his attribute of sovereignty, for we are a nation of sovereigns. Maine says: "Thus in the United States sovereignty is vested in the body of adult male citizens." (Early History of In-

stitutions, p. 349.) The citizens are sovereigns only so long as they have the right of suffrage, the right to vote for the State executive, judiciary, and legislature, and for the President of the United States. When that right is taken away they cease to be electors; they cease to be citizens of the Republic and become subjects; they lose that which one who is worthy to be a constituent member of a free government would prize most highly.

But the amendment does not merely include this right in general terms and protect it by implication merely, it clearly and specifically declares it. After the double prohibition of State action which shall abridge this right it prescribes the basis of State representation and declares: "But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, etc., is denied to any of the male inhabitants of such State, being twenty-one years of age and citizens of the United States, or in any way abridged except for participation in rebellion or other crime, the basis of representation therein shall be reduced," etc.

Thus we have the decisions of the Supreme Court of the United States that the amendment furnished an additional guarantee for the protection of the privileges and immunities which the citizens then had, and that those privileges and immunities were such as "belonged to citizens of the United States in that relation and character;" and at that time every citizen of the United States who was a male inhabitant in any State and twenty-one years of age had the right, under the laws of all the States—in whatsoever State he lived—to vote at an election for electors of President and Vice-President of the United States, for every elector to

which the State was entitled. And now the amendment comes in and says what? It guarantees that right, and it provides that when a State recognizes that right and does not seek to deprive the citizen of that right it shall have a basis of representation according to its population, excluding Indians, not taxed; but it also declares that if any State shall deny to any one of these male inhabitants twenty-one years of age, who are citizens of the United States, that right to vote, or shall in any way abridge that right, a certain penalty shall follow.

Unless "the right to vote at any election for the choice of electors for President and Vice-President of the United States," thus specifically designated in the amendment, means the right existing at the time of the adoption of the amendment, what does it mean?

Does it mean a merely contingent, indefinite, indefinable right which from time to time the legislature may thereafter alter? Then how can it be abridged by any law of a State? Unless it means, as it clearly must mean, the existing right to vote of these male inhabitants twenty-one years of age who are citizens of the United States there is nothing in it.

It cannot be that such apt and precise words would have been used if the intention was merely to save to qualified citizens an undefined right to vote in such way as the State might from time thereafter prescribe. If so, the prohibition against *abridgement* would be meaningless.

The right so accurately described was the existing uniform right which in every State the citizen then had.

The privileges and immunities protected by the second clause of the first section included this right to vote in general terms, but to prevent any misconstruction and more

sacredly guard it the specific right is named in the penalty clause.

Can this have any effect but one? Can my right to vote for electors of President and Vice-President of the United States be declared any more strongly than by that constitutional declaration to my State that if she denies me a right she shall suffer and be lowered in her right of representation? Shall lose her rank in the halls of Congress?

But it is claimed that the penalty prescribed for a denial or abridgement of the right clearly implies that the denial or abridgement must be by way of discrimination, and that the Michigan law is not within the penalty, because it applies to all electors alike. The proposition is that the State can violate the amendment, deprive the qualified citizen of the United States of his right to vote for President and Vice-President, but because it does this in such way that it cannot be punished the injured citizen cannot invoke the protection of the amendment.

The ethics of the proposition are not to be commended.

It is not too clear that the penalty may not apply and deprive the State of all representation; and the law does discriminate against the citizen of the United States whose right is thus abridged. In the language of the Maryland preamble, "it deprives the majority of the qualified (United States) citizens residing in Michigan of their just weight in the choice of the chief magistrate."

Again, I submit that if a State enacts a law so artfully framed that the right to vote may be abridged—that it will work the mischief which the penalty is intended to punish—and yet the penalty may be avoided, this fact itself demonstrates that the law is in conflict with the amendment. In

other words, that the amendment *ex proprio vigore* prohibits any State from authorizing any manner of voting by means of which the right of the qualified citizens of the United States to vote for electors of President and Vice-President may be abridged and the State's representation in Congress be unaffected by the penalty.

Take, for example, an act providing that certain districts with a minority of the population of the State should elect double the number of presidential electors that an equal number of other districts having a majority of the population of the State could elect. How could the State's representation in Congress be reduced? Would the largest districts, who vote for the smaller number of electors, be again deprived of their representation? Yet the citizens of the smaller districts would not be deprived of any of their privileges, so the penalty could not be imposed on them. Thus we would have a law providing a mode of voting which plainly violated the amendment, but for which there was no penalty. Would a court uphold such a law as valid merely because its skillful but unscrupulous framers found a way to commit the crime and evade the punishment?

Again, it has been argued that there is no penalty there, that it simply makes two bases of representation; one basis if everybody votes, another basis if certain of the people are not allowed to vote. That is literally true, but the lower basis is on the basis of a forfeiture of a certain amount of representation, and that forfeiture is commanded and prescribed by the amendment only in case of the wrongful act of the State. Can it be said that if this State is entitled to twelve members of Congress and two Senators and her legislature passes a law by which she forfeits her right to more

than six members of Congress and two Senators there is not a penalty for the passage of such an act, and that the law is all right? Can it be said that a State has any right to pass a law which will bring such a punishment on her people?

But this contention of defendant in error is directly at variance with the decision of the Court in *Strauder* vs. *West Virginia*, 100 U. S., p. 307.

Mr. Justice Strong, in speaking for the Court, says:

"The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity or right."

I am not unmindful that this reasoning will render necessary the striking out of article II, section 1, clause 2, of the Constitution, the words "in such manner as the legislature thereof may direct." Such, I believe, to be the effect of the amendment.

The electors of President and Vice-President, under the amendment, must be chosen by the votes of the qualified citizens at an election for that purpose. There cannot be any other construction of the words "the right to vote at an election for the choice of electors of President and Vice-President of the United States."

It cannot be said that if the voter votes for members of a legislature which chooses the electors this will satisfy the amendment. The amendment gives him by its express terms the right to vote for "members of the legislature" and "electors of President and Vice-President.'

This right to vote for electors—not for one elector, not for as many as the legislature may name, but for all—this right which is specifically named, cannot be taken away by any

subsequent act of any State legislature. Here we have United States citizenship defined, and it cannot be qualified by State legislation. No property restriction or other qualification can be added by any State. Every male inhabitant twenty-one years and upwards and a citizen of the United States has a right to vote in the State where he resides for electors of President of the United States, whether he be weak or strong or poor or rich, and he can only be deprived of it by participation in the rebellion or some other crime, and this right is so precious that the amendment declares it shall not be touched except for crime or treason. Shall we pare it away by fine reasoning and say that it applies merely to the basis of representation of the State, but gives the individual voter no right?

This amendment came directly after the war. It is one of the great trinity of amendments. The thirteenth forever prohibited slavery, the fourteenth gave equality before the law, the fifteenth prohibited the United States as well as the States from abridging the right of suffrage on account of race, color, or previous condition of servitude.

These three amendments followed the war to establish this Government forever, as I believe it is established forever. They are greater than any immediate results of the war—greater than all other results of the war. They have put into the Constitution of the United States equality before the law; they have put into the Constitution of the United States a guarantee to every citizen to be treated alike, and to every voter a guarantee of his right of suffrage. They have been written there with the blood of patriotic men, and I submit that these articles, in their full meaning and intent, should be declared to be "the supreme law of the land, and

the judges in every State should be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

III.

The Michigan statute is in conflict with the act of Congress of February 3, 1887.

Some provisions of the act of Congress of February 3, 1887, chapter 90 of Supplement of the U. S. Revised Statutes of 1891, p. 525, and of act No. 50, Public Acts of Michigan, 1871, are printed below in parallel columns:

Act of Congress.	*Act No. 50.*
SEC. 1. Electors of each State to meet *on the second Monday in January* following their appointment.	SEC. 4. Electors shall convene * * * on *the first Wednesday in December* immediately following their election.
SEC. 3 makes it the duty of the *executive* of each State to communicate under the seal of the State to the Secretary of State of the United States a certificate of the ascertainment of the electors appointed setting forth their names, the canvass, and the number of *votes for each person for whose appointment any or all votes have been given or cast*; also *to deliver to the electors* of such State the same certificate in triplicate under the seal of the State. * * * Such certificate to the electors shall be inclosed and transmitted by the electors at the same time and in the same manner as is provided by law for the transmitting by such electors to the seat of government the lists of all persons voted for as President and of all persons voted for as Vice-President.	SEC. 3 makes it the duty of the *Secretary of State* to prepare three lists of the names of the electors and alternate electors, procure thereto the signature of the governor, affix the seal of the State thereto, and deliver such certificates thus signed and sealed to one of the electors on or before the first Wednesday of December next following the election. NOTE.—That no provision is made in the State act for sending any certificate to the Secretary of State of the United States or any other United States officials and no provision for making any statement of the number of votes given for any and all persons for whose appointment any votes were cast.

The first difference is the date of the meeting of electors. The State law fixes the meeting during the term of the State administration elected at the election preceding the presidential election. The act of Congress fixes the meeting after the installation of the State officers elected at the same election at which the electors are chosen. The other differences are found in section 3 of each act. The act of Congress makes it the duty of the executive of each State to communicate under the seal of the State to the Secretary of State of the United States a certificate of the ascertainment of the electors appointed, and requires the governor to deliver to the electors another copy of this list. The Michigan act makes it the duty of the secretary of state to prepare and deliver such a certificate to one of the electors. It makes no provision whatsoever that the secretary of state of the State of Michigan send to the Secretary of the United States any one of those lists, neither does it make any provision for the governor sending any such lists. The Michigan act requires the secretary of state to give to an elector a copy of a certificate, which does not conform in all respects to the act of Congress.

Now, it is conceded, as I understand it, that in so far as the Michigan act conflicts with the act of Congress it is void.

But, it is claimed that the only effect of this conflict is to make so much of the State law a nullity, and that notwithstanding this conflict the State law will stand with the conflicting parts stricken out.

We insist that this conflict between the acts reaches farther.

When an act of a State legislature, purporting to carry out a duty imposed on the State by the Constitution of the

United States, directs certain officers of the State to do certain things which the act of Congress passed in pursuance of the Constitution of the United States commands other State officers to do and to perform these acts in a different manner, the whole of the State law is illegal and void. The vice of the State law is that it is in hostility to the act of Congress. There is no presumption that the State law was passed in ignorance of the United States law. The legislature are presumed to know the laws of the United States governing State action.

It is a different case from that where an old law of a State which, when it was passsed, was valid is superseded by a later act of Congress. The former legislature of Michigan, in 1889, thought it necessary to pass the first act of their session, and give it immediate effect on January 11, 1889, so that the presidential electors of Michigan might meet under it on the 14th day of January, 1889, the date fixed by the act of Congress. It was evident, then, that the legislature thought that there ought not to be any conflict between the act of a State and the act of Congress, and yet that was an old law which had been entirely superseded by the act of Congress.

Here is a law later in date, in terms hostile. On what rule of construction can it be said that the legislature of 1891 did not know of the act of Congress? The presumption is that the legislature did know the laws of the United States, and the other presumption follows that, with full knowledge of the act of Congress, they passed this act No. 50 in hostility to it. Thus construed the whole act must be held void.

Any other ruling might deprive the State of its vote in the electoral college. Suppose the executive of the State

should say, "The State law makes it the duty of the secretary of state to send out and deliver these certificates and I will not do it," and the secretary of state should say, "The State law does not require me to put the number of votes cast in my statement, and I will not do it," then the governor would not send the statement required by the act of Congress and made thereby the sole evidence of the choice of electors, and the statement which the secretary of state did send would not conform to the requirements of the act of Congress and Michigan might lose her vote in the electoral college. The matter is too important to allow any construction of a law which makes such a contingency possible. The danger to the public peace, not only in the State of Michigan, but at the National Capitol, which lurks in such conflicting legislation imperatively requires that not only the conflicting portions of the State law be held void, but also that they be held to be so connected with the whole law and its operation that it all must fall with them.

The question here is not one of mere party politics. It goes deeper. It affects the rights of all the electors in the State of Michigan, be they Republican, Democrat, Populist, or Prohibitionist. Its decision by the Court will either confirm the right they have always exercised of voting for all the presidential electors to which the State is entitled or it will curtail that right and limit it to two electors. In the one case they will be clothed with the same right as the other citizens of the United States in every State; in the other case they will be "deprived of their just weight in the choice of the Chief Magistrate as compared with the citizens of all the other States."

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APPENDIX.

Sections 147 *and* 240, *Howell's Annotated Statutes of Michigan, Vol.* 1, *pp.* 133–151.

§ 147, SEC. 11. The secretary of state shall, between the first day of July and the first day of September preceding a general election, direct and cause to be delivered to the sheriff of each county in this State, a notice, in writing, that at the next general election there will be chosen as many of the following officers as are to be elected at such general election, viz: A governor, lieutenant governor, secretary of state, state treasurer, auditor general, attorney general, superintendent of public instruction, commissioner of the State land office, members of the State board of education, electors of President and Vice-President of the United States, and a Representative in Congress for the district to which each of such counties shall belong.

§ 240, SEC. 83. At the general election next preceding the choice of President and Vice-President of the United States, there shall be elected by general ticket as many electors of President and Vice-President, as this State may be entitled to elect of Senators and Representatives in Congress.

Act No. 50, *Public Acts of* 1891 *of Michigan, pp.* 50, 51.

AN ACT to provide for the election of electors of President and Vice-President of the United States and to repeal all other acts and parts of acts in conflict herewith.

SECTION 1. The people of the State of Michigan enact that at the general election next preceding the choice of President and Vice-President of the United States, there shall be elected as many electors of President and Vice-

President as this State may be entitled to elect of Senators and Representatives in Congress in the following manner, that is to say, there shall be elected by the electors of the districts hereinafter defined one elector of President and Vice-President of the United States in each district who shall be known and designated on the ballot respectively, as eastern district elector of President and Vice-President of the United States at large, and western district elector of President and Vice-President of the United States at large; there shall also be elected in like manner two alternate electors of President and Vice-President, who shall be known and designated on the ballot, as eastern district alternate elector of President and Vice-President of the United States at large, and western district alternate elector of President and Vice-President of the United States at large, for which purpose the first, second, sixth, seventh, eighth, and tenth congressional districts shall compose one district to be known as the eastern electoral district, and the third, fourth, fifth, ninth, eleventh and twelfth congressional districts shall compose the other district, to be known as the western electoral district; there shall also be elected by the electors in each congressional district into which the State is or shall be divided one elector of President and Vice-President, and one alternate elector of President and Vice-President the ballots for which shall designate the number of the congressional district and the persons to be voted for therein as district elector and alternate district elector of President and Vice-President of the United States respectively.

SEC. 2. The counting, canvassing and certifying of the votes cast for said electors at large, and their alternates and said district electors and their alternates, shall be done, as near as may be, in the same manner as is now provided by law for the election of electors of President and Vice-President of the United States.

SEC. 3. The Secretary of State shall prepare three lists of

the names of the electors and the alternate electors, procure thereto the signature of the governor, affix the seal of the State to the same, and deliver such certificates thus signed and sealed to one of the electors on or before the first Wednesday of December next following said general election. In case of death, disability, refusal to act, or neglect to attend, by the hour of twelve o'clock at noon of said day, of either of said electors at large, the duties of the office shall be performed by the alternate electors at large, that is to say: The eastern district alternate elector at large shall supply the place of the eastern district elector at large, and the western district alternate elector at large shall supply the place of the western district elector at large. In like case, the alternate congressional district elector shall supply the place of the congressional district elector. In case two or more persons have an equal and the highest number of votes for any office created by this act as canvassed by the board of State canvassers, the legislature in joint convention shall choose one of said persons to fill such office, and it shall be the duty of the governor to convene the legislature in special session for such purpose immediately upon such determination by said board of State canvassers.

SEC. 4. The said electors of President and Vice-President shall convene in the senate chamber at the capital of the State at the hour of twelve o'clock at noon, on *the first Wednesday of December immediately following* their election, and shall proceed to perform the duties of such electors as required by the Constitution and the laws of the United States. The alternate electors shall also be in attendance, but shall take no part in the proceedings except as herein provided.

SEC. 5. Each of said electors and alternate electors shall receive the sum of five dollars for each day's attendance at the meetings of the electors as above provided, and five cents per mile for the actual and necessary distance traveled each way in going to and returning from said place of meet-

ing, the same to be paid by the State treasurer upon the allowance of the board of State auditors.

SEC. 6. All acts and parts of acts in conflict with the provisions of this act are hereby repealed.

Approved May 1, 1891.

Act No. 168, *Public Acts of Michigan* 1891, *pp.* 208–'9.

An act to divide the State of Michigan into twelve congressional districts.

SECTION 1. The people of the State of Michigan enact, That this State shall be divided into twelve congressional districts pursuant to a ratio of representation fixed by an act of Congress for the year one thousand eight hundred and ninety-one for the apportioning anew of the representatives among the several States, and each district shall be entitled to elect one representative, the districts to be constituted and numbered as follows, to wit:

First. The first district shall consist of the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, thirteenth and fifteenth wards of the city of Detroit.

Second. The second district shall consist of the counties of Jackson, Lenawee, Washtenaw and Monroe, and the townships of Plymouth, Canton, Van Buren, Romulus, Sumpter, Huron, Brownston, Monguagon, Taylor and Ecorse, and the city of Wyandotte in Wayne county.

Third. The third district shall consist of the counties of Hillsdale, Branch, Calhoun, Kalamazoo and Eaton.

Fourth. The fourth district shall consist of the counties of St. Joseph, Cass, Berrien, Van Buren, Allegan and Barry.

Fifth. The fifth district shall consist of the counties of Ottawa, Kent and Ionia.

Sixth. The sixth district shall consist of the counties of Ingham, Livingston, Genesee and Oakland, the townships of Livonia, Nankin, Dearborn, Redford, Springwells and Greenfield in the county of Wayne, and the twelfth, fourteenth and sixteenth wards of the city of Detroit.

Seventh. The seventh district shall consist of the counties of Huron, Sanilac, Lapeer, St. Clair and Macomb, and the townships of Grosse Point and Hamtramck in Wayne county.

Eighth. The eighth district shall consist of the counties of Tuscola, Saginaw, Shiawassee and Clinton.

Ninth. The ninth district shall consist of the counties of Muskegon, Newago, Oceana, Mason, Lake, Wexford, Manistee, Benzie, Leelenaw and Manitou.

Tenth. The tenth district shall consist of the counties of Bay, Midland, Gladwin, Arenac, Ogemaw, Iosco, Alcona, Oscoda, Crawford, Montmorency, Elpena, Presque Isle, Cheboygan, Emmet and Otsego.

Eleventh. The eleventh district shall consist of the counties of Montcalm, Gratiot, Isabella, Mecosta, Osceola, Clare, Roscommon, Missaukee, Kalkaska, Grand Traverse, Antrim and Charlevoix.

Twelfth. The twelfth district shall consist of the counties of Delta, Schoolcraft, Chippewa, Mackinac, Ontonagon, Marquette, Menominee, Dickinson, Baraga, Houghton, Keweenaw, Isle Royal, Alger, Luce, Iron and Gogebic.

Approved June 26th, 1891.

Sections 9, 10, and 19 of Act No. 190 Public Acts of Michigan 1891, pp. 258, 263.

SEC. 9. In each county in the State, the judge of probate, county clerk and county treasurer, shall constitute a board of election commissioners, two of whom shall constitute a quorum and of which board the judge of probate shall be chairman and the county clerk shall be secretary. It shall be the duty of said board to prepare and distribute ballots and stamps for election of all officers for whom the electors are entitled to vote, and for all proposed constitutional amendments or other questions to be submitted to the electors of the State for popular vote in compliance with the provisions of law. The members of said board shall serve without compensation.

SEC. 10. The said board of election commissioners shall cause to be printed on the ballot the names of the candidates nominated by the regularly called convention of any party, and it shall be the duty of the State, district or county committee of each political party to forward to the said board of election commissioners of each county in the State, not less than twenty days prior to any such election, a copy of the vignette adopted by them and the names of all candidates nominated at any regularly called convention, at which candidates for any of the offices mentioned in section 1 of this act shall be nominated and no other names, unless authorized or instructed by said convention. All the names of parties so nominated shall be certified to by the chairman and secretary of the respective committees.

SEC. 19. It shall be the duty of the chairman of the board of election inspectors of each voting precinct in each county, or in case he cannot attend, some other member of such board, authorized in writing by (the) said chairman, to appear at the office of the county clerk of his county, not more than four nor less than two days before each election, and the

board of election commissioners shall deliver to him, in a sealed package, the ballots and the stamps provided for his precinct. The necessary number of ballots shall be wrapped and tied in packages, and securely sealed with wax, and the chairman of said board, or some other member thereof duly authorized therefor, shall make and sign a certificate setting forth the number of ballots in such package, and that such ballots were packed and sealed by himself personally, and upon delivery of such package and said certificate to said inspector of elections he shall receipt for the same; and for the safe sealing of such ballots, the county board of election commissioners shall provide themselves with a seal of such design as they may deem proper. Said packages shall not be opened until delivered to the election board of the respective voting precincts, to which they are directed, when said boards shall be fully organized and ready for the reception of votes as in this act provided.

Office Supreme Court U. S.
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IN THE

SUPREME COURT of the UNITED STATES.

OCTOBER TERM, 1891

WILLIAM McPHERSON, JR., et al.
Plaintiffs in Error,

vs.

ROBERT R. BLACKER,
Secretary of State of the State of Michigan.
Defendant in Error

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

Motion to Advance and Brief for Plaintiffs in Error in Support of Motion.

HENRY M. DUFFIELD,
Attorney for Plaintiffs in Error.

RAYNOR & TAYLOR, PRINTERS.

SUPREME COURT of the UNITED STATES.

OCTOBER TERM, 1891.

WILLIAM McPHERSON, JR., et al, *Plaintiffs in Error,* vs. ROBERT R. BLACKER, Secretary of State of the State of Michigan, *Defendant in Error.*	ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

Motion to Advance and Brief for Plaintiffs in Error in Support of Motion.

MOTION.

The plaintiffs in error come by Henry M. Duffield, their counsel, and respectfully ask that the above entitled cause may be advanced on the call and order of the docket, and the earliest practicable day assigned for its hearing, for the following reasons:

First. Because the cause as shown by the record thereof is one of very great public interest and importance.

Secondly. For the special and peculiar circumstances set forth in this motion and the accompanying affidavit and abstract of record.

Thirdly. Because upon the decision of the cause depends the right of every legal voter in the State of Michigan and the right of every male inhabitant of the State of Michigan who is twenty-one years of age and a citizen of the United States, to vote at an election for the choice of electors for president and vice-president of the United States, for all of said electors to which the State of Michigan is entitled, and because the decision of the cause will not be efficacious and will be of no practical avail to said legal voters of the State of Michigan unless the same is announced and the order thereon made at an early day in the October term, 1892, of this Court, and in season to be operative and enforced before the coming presidential election on the 8th day of November, 1892.

Fourthly. Because upon the decision of this case depends the right of the plaintiffs in error to be voted for as presidential electors at the next presidential election by every male inhabitant of the State of Michigan who is twenty-one years of age and a citizen of the United States and who may desire so to do, and the decision of the case, if in favor of the plaintiffs in error, will not be efficacious and will be of no practical avail to the petitioners unless the same can be had and an order made thereon at an

early day in the October term, 1892, of this Court, and in season to be operative and enforced before the coming presidential election on the 8th day of November, 1892.

Fifthly. Because in order to render the decision and judgment in this cause of any benefit and advantage to plaintiffs in error, and to the legal voters of the State of Michigan, the same must be rendered in season to enable plaintiffs in error to compel the defendant in error to issue the notices for the election of electors of president and vice-president of the United States in the manner prayed for in the petition in this cause at the next presidential election to be held on the 8th day of November, 1892.

This motion is based upon the abstract of the record and affidavit of Henry M. Duffield hereto attached.

HENRY M. DUFFIELD,
Attorney for Plaintiffs in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

WILLIAM McPHERSON, Jr., et al,
Plaintiffs in Error,

vs.

ROBERT R BLACKER,
Secretary of State of the State of Michigan,
Defendant in Error.

STATE OF MICHIGAN,
Eastern District of Michigan,
COUNTY OF WAYNE, } ss.

Henry M. Duffield, being duly sworn, deposes and says:

1. He is the attorney for the plaintiffs in error and makes this affidavit in their behalf.

2. The Supreme Court of Michigan denied the petition and refused to issue a mandamus in the case upon the ground that in the opinion of the Court, the said Act No. 50 of the Public Acts of Michigan of 1891, did not contravene and was not repugnant either to Article 2, Section 1, paragraph two of the Constitution of the United States or to

the Fourteenth Amendment to the Constitution of the United States.

3. The date fixed by law for the next election of electors of president and vice-president of the United States is the 8th day of November, 1892.

4. By Section 10 of Act No. 190 of Public Acts of Michigan of 1891, it is made the duty of a Board of Election Commissioners in each county composed as provided by Section 9 of said Act of the Judge of Probate, County Clerk and County Treasurer thereof to cause to be printed on the ballots which they are by said Section 9 required to prepare and distribute at every general election the names of the candidates nominated by the regularly called convention of any party, and by Section 19 of said act they are required to deliver said ballots at the office of the county clerk of each county not more than four nor less than two days before each election to the chairman of the board of election inspectors of each voting precinct in each county, or in case he cannot attend, to some other member of such board.

5. It has been made public through the press of the State of Michigan before and after the decision of this cause by the Supreme Court of Michigan and in connection with the allowance of the Writ of Error in this cause by the Chief Justice thereof, that in case of an appeal thereof to the United States Supreme Court the plaintiffs in error would move to advance the cause and, if possible, obtain a hearing at the earliest practicable day in the October term, 1892.

6. That on the 30th day of August, 1892, he advised the attorney for the defendant in error in the Supreme Court of Michigan—Hon. A. A. Ellis, Attorney General of Michigan—by letter, a copy of which is hereto attached marked "A,", that he intended to move at the opening of the October term to advance this cause and to ask this Court to hear the same on the second day of the term, if possible, or at the earliest practicable day thereafter, and that in a few days this deponent would serve him with a copy of such motion, and a copy of his brief on the merits in said cause to be used at said hearing, and requested him to prepare for such hearing.

7. In connection with and at the same time as the service of this motion, he has served upon said attorney for the defendant in error in the Supreme Court of the State of Michigan, and also upon the defendant in error copies of the brief for plaintiffs in error in this cause which is herewith filed, and intended to be used at the hearing of this cause upon the merits, together with a notice that upon the same the cause will be argued and that the plaintiffs in error under their motion to advance the cause to ask the Court, because of the peculiar circumstances of the case, to hear the cause on the second day of the October term, 1892, if possible, or at the earliest practicable day thereafter.

8. True copies of Acts Nos. 50 and 168, of the Public Acts of the State of Michigan, of 1891, Sections 147 and 240 of Howell's Annotated Statutes of Michigan, and Sections 9, 10 and 19 of Act No.

190 of the Public Acts of Michigan of 1891, are hereto annexed marked "B."

And further deponent saith not.

HENRY M. DUFFIELD.

Sworn to and subscribed before me
this 12th day of September, 1892.

[NOTARIAL SEAL.]

ANNA M. GRIFFIN,
Notary Public, Wayne Co., Mich.

"A."

IN THE UNITED STATES SUPREME COURT.

WILLIAM McPHERSON, JR., et al.
Plaintiff in Error,

vs.

ROBERT R. BLACKER,
Secretary of State of the State of Michigan.
Defendant in Error.

Detroit, Mich., August 30th, 1892.

Hon. A. A. Ellis, Attorney General, Lansing, Mich.

DEAR SIR:

I write this to notify you that I intend at the opening of Court on the first day of the October term 1892, or as soon thereafter as counsel can be heard, to move to advance the above entitled cause upon the docket and to ask the court to hear the same on the second day of said October term, 1892, or on the earliest practicable day thereafter. I am preparing the formal motion for that purpose and will soon serve

you with a copy thereof, and at the same time will serve you with a copy of the brief on which I intend to rely on the hearing of said cause on the merits.

I trust that you will make such preparation as you may think necessary so that the cause may be argued at once upon the opening of the October term.

Yours truly,

HENRY M. DUFFIELD,

Attorney for Plaintiffs in Error.

"B."

Sections 147 *and* 240 *Howell's Annotated Statute of Michigan, Vol.* 1. *pp.* 133,-151.

§ 147, Sec. 11. The Secretary of State shall, between the first day of July and the first day of September preceding a general election, direct and cause to be delivered to the sheriff of each county in this state, a notice, in writing, that at the next general election there will be chosen as many of the following officers as are to be elected at such general election, viz: A governor, lieutenant governor, secretary of state, state treasurer, auditor general, attorney general, superintendent of public instruction, commissioner of the state land office, members of the state board of education, electors of president and vice president of the United States, and a representative in congress for the district to which each of such counties shall belong.

§ 240, Sec. 83. At the general election next preceding the choice of president and vice president of

the United States, there shall be elected by general ticket as many electors of president and vice-president, as this state may be entitled to elect of senators and representatives in congress.

Act No. 50, *Public Acts of* 1891 *of Michigan, pp.* 50-51.

AN ACT to provide for the election of electors of President and Vice President of the United States and to repeal all other acts and parts of acts in conflict herewith.

Section 1. The People of the State of Michigan enact, That at the general election next preceeding the choice of President and Vice President of the United States, there shall be elected as many electors of President and Vice President as this state may be entitled to elect of Senators and Representatives in Congress, in the following manner, that is to say: There shall be elected by the electors of the districts hereinafter defined one elector of President and Vice President of the United States in each district who shall be known and designated on the ballot respectively, as eastern district elector of President and Vice President of the United States at large, and western district elector of President and Vice President of the United States at large; there shall also be elected in like manner two alternate electors of President and Vice President, who shall be known and designated on the ballot, as eastern district alternate elector of President and Vice President of the United States at large, and western district alternate elector of President and Vice President of the United States at large, for which purpose the first, second, sixth, seventh

eighth and tenth congressional districts shall compose one district to be known as the eastern electoral district, and the third, fourth, fifth, ninth, eleventh and twelfth congressional districts shall compose the other district, to be known as the western electoral district; there shall also be elected by the electors in each congressional district into which the State is or shall be divided one elector of President and Vice President, and one alternate elector of President and Vice President the ballots for which shall designate the number of the congressional district and the persons to be voted for therein as district elector and alternate district elector of President and Vice President of the United States respectively.

Sec. 2. The counting, canvassing and certifying of the votes cast for said electors at large, and their alternates and said district electors and their alternates, shall be done, as near as may be, in the same manner as is now provided by law for the election of electors of President and Vice President of the United States.

Sec. 3. The Secretary of State shall prepare three lists of the names of the electors and the alternate electors, procure thereto the signature of the Governor, affix the seal of the State to the same, and deliver such certificates thus signed and sealed to one of the electors on or before the first Wednesday of December next following said general election. In case of death, disability, refusal to act, or neglect to attend, by the hour of twelve o'clock at noon of said day, of either of said electors at large, the duties of the office shall be performed by the alternate electors at large, that is to say: The eastern district alternate elector

at large shall supply the place of the eastern district elector at large, and the western district alternate elector at large shall supply the place of the western district elector at large, In like case, the alternate congressional district elector shall supply the place of the congressional district elector. In case two or more persons have an equal and the highest number of votes for any office created by this act as canvassed by the board of State canvassers, the legislature in joint convention shall choose one of said persons to fill such office, and it shall be the duty of the Governor to convene the legislature in special session for such purpose immediately upon such determination by said board of State canvassers.

Sec. 4. The said electors of President and Vice President shall convene in the senate chamber at the capital of the State at the hour of twelve o'clock at noon, on *the first Wednesday of December immediately following* their election, and shall proceed to perform the duties of such electors as required by the constitution and the laws of the United States. The alternate electors shall also be in attendance, but shall take no part in the proceedings except as herein provided.

Sec. 5. Each of said electors and alternate electors shall receive the sum of five dollars for each day's attendance at the meetings of the electors as above provided, and five cents per mile for the actual and necessary distance traveled each way in going to and returning from said place of meeting, the same to be paid by the State Treasurer upon the allowance of the Board of State Auditors.

Sec. 6. All acts and parts of acts in conflict with the provisions of this act are hereby repealed.

Approved May, 1, 1891.

Act No. 168, *Public Acts of Michigan* 1891, *pp.* 208-9.

An ACT to divide the state of Michigan into twelve congressional districts.

Section 1. The people of the State of Michigan enact, That this state shall be divided into twelve congressional districts pursuant to a ratio of representation fixed by an act of congress for the year one thousand eight hundred and ninety-one for the apportioning anew of the representatives among the several states, and each district shall be entitled to elect one representative, the districts to be constituted and numbered as follows, to-wit:

First. The first district shall consist of the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, thirteenth and fifteenth wards of the city of Detroit.

Second. The second district shall consist of the counties of Jackson, Lenawee, Washtenaw and Monroe, and the townships of Plymouth, Canton, Van Buren, Romulus, Sumpter, Huron, Brownston, Monguagon, Taylor and Ecorse, and the city of Wyandotte in Wayne county.

Third. The third district shall consist of the counties of Hillsdale, Branch, Calhoun, Kalamazoo and Eaton.

Fourth. The fourth district shall consist of the counties of St. Joseph, Cass, Berrien, Van Buren, Allegan and Barry.

Fifth. The fifth district shall consist of the counties of Ottawa, Kent and Ionia.

Sixth. The sixth district shall consist of the counties of Ingham, Livingston, Genessee and Oakland, the townships of Livonia, Nankin, Dearborn, Redford, Springwells and Greenfield in the county of Wayne, and the twelfth, fourteenth and sixteenth wards of the city of Detroit.

Seventh. The seventh district shall consist of the counties of Huron, Sanilac, Lapeer, St. Clair and Macomb, and the townships of Grosse Point and Hamtramck in Wayne county.

Eighth. The eight district shall consist of the counties of Tuscola, Saginaw, Shiawassee and Clinton.

Ninth. The ninth district shall consist of the counties of Muskegon, Newago, Oceana, Mason, Lake Wexford, Manistee, Benzie, Leelanaw and Manitou.

Tenth The tenth district shall consist of the counties of Bay, Midland, Gladwin, Arenac, Ogemaw, Iosco, Alcona, Oscoda, Crawford, Montmorency, Alpena, Presque Isle, Cheboygan, Emmet and Otsego.

Eleventh. The eleventh district shall consist of the counties of Montcalm, Gratiot, Isabella, Mecosta, Osceola, Clare, Roscommon, Missaukee, Kalkaska, Grand Traverse, Antrim and Charlevoix.

Twelfth. The twelfth district shall consist of the counties of Delta, Schoolcraft, Chippewa, Mackinac, Ontonagon, Marquette, Menominee, Dickinson Baraga, Houghton, Keweenaw, Isle Royal, Alger, Luce, Iron and Gogebic.

Approved June 26th, 1891.

Sections 9, 10 *and* 19 *of Act No.* 190 *Public Acts of Michigan* 1891, *pp.* 258, 263.

Sec. 9. In each county in the state, the judge of probate, county clerk and county treasurer, shall constitute a board of election commissioners, two of whom shall constitute a quorum and of which board the judge of probate shall be chairman and the county clerk shall be secretary. It shall be the duty of said board to prepare and distribute ballots and stamps for election of all officers for whom the electors are entitled to vote, and for all proposed constitutional amendments or other questions to be submitted to the electors of the state for popular vote in compliance with the provisions of law. The members of said board shall serve without compensation.

Sec. 10. The said board of election commissioners shall cause to be printed on the ballot the names of the candidates nominated by the regularly called convention of any party, and it shall be the duty of the State, district or county committee of each political party to forward to the said board of election commissioners of each county in the State, not less than twenty days prior to any such election, a copy of the vignette adopted by them and the names of all candidates nominated at any regularly called convention, at which candidates for any of the offices mentioned in Section 1 of this act shall be nominated and no other names, unless authorized or instructed by said convention. All the names of parties so nominated shall be certified to by the chairman and secretary of the respective committees.

Sec. 19. It shall be the duty of the chairman of

the board of election inspectors of each voting precinct in each county, or in case he cannot attend, some other member of such board, authorized in writing by (the) said chairman, to appear at the office of the county clerk of his county, not more than four nor less than two days before each election, and the board of election commissioners shall deliver to him, in a sealed package, the ballots and the stamps provided for his precinct. The necessary number of ballots shall be wrapped and tied in packages, and securely sealed with wax, and the chairman of said board, or some other member thereof duly authorized therefor, shall make and sign a certificate setting forth the number of ballots in such package, and that such ballots were packed and sealed by himself personally, and upon delivery of such package and said certificate to said inspector of elections he shall receipt for the same; and for the safe sealing of such ballots, the county board of election commissioners shall provide themselves with a seal of such design as they may deem proper. Said packages shall not be opened until delivered to the election board of the respective voting precincts, to which they are directed, when said boards shall be fully organized and ready for the reception of votes as in this act provided.

BRIEF.

Plaintiffs in error are the nominees of the Republican party in the State of Michgan for the office of presidential elector. They claim the right to be voted for on a general ticket throughout the entire State of Michigan as provided by law and uniformly the custom in said state since the admission of the state into the Union.

Howell's Annotated Statutes, §§147 and 240.

Act No. 50, of the Public Acts of 1891, if valid, by necessary implication repeals the former law. It divides the state into twelve electoral districts and two election districts at large, so-called, and provides for the election of a presidential elector and an alternate presidential elector in each of said districts by the voters thereof. In no case are all the voters in the state afforded an opportunity to vote for an elector. The plain purpose of the act is to deprive the people of the state, as a whole, of any expression of their choice in the coming presidential election. To this end the state and its people are divided into two classes of districts. One, the two so-called districts at large; the other, the congressional districts. And apparently with the sole purpose of preventing the people of the state, as a whole, from any voice

whatever in determining who are the legally elected electors, the Act in direct opposition to the Act of Congress fixes the day of meeting of such electors on the first Wednesday in December, instead of the second Monday in January following the election.

Plaintiffs in error began this proceeding to test the constitutionality of the act. They demanded that defendant in error, the secretary of state of the State of Michigan, should issue his notices of election of electors for president and vice-president of the United States under the old law, and upon his refusal so to do filed their petition for a mandamus. Their main objections were that the act contravened and was repugnant (1) to Article 2, Section 1, paragraph two of the Constitution of the United States; (2) to the Fourteenth Amendment to the Constitution of the United States and (3) was in contradiction of and hostility to the Act of Congress of February 3d, 1887.

The State Court overruled these objections and denied the mandamus, holding that the act did not conflict with the Constitution of the United States or the Act of Congress and was valid.

The jurisdiction of this Court to finally decide the question and the desirability of having a decision upon the question from a Court whose authority is co-extensive with the Union must be conceded. The question involved in the case may affect the rights not only of the electors of Michigan but also the rights of the electors of other states in the Union.

Ample notice of this motion has been given the opposite party, and the questions in the case have

been fully argued in the State Court. We are advised by the counsel for defendant in error that they will not oppose the motion. The case would seem to be of more public interest than Boyd vs. Nebraska, 143 U. S., p. 135.

It is plainly shown in the motion and accompanying papers that unless the cause is advanced and decided during the first days of the term, the decision of the case cannot have any effect on the coming election, but if the cause is advanced and decided within the first week or ten days of the term, the decision will be operative upon the coming election.

We submit that in view of the intrinsic public importance and interest of the questions involved in the case and the number of electors whose political rights are involved in the cause, the motion should be granted.

HENRY M. DUFFIELD,
FRED. A. BAKER,
Of Counsel for Plaintiffs in Error.

Office Supreme Court U. S.
FILED.
OCT 6 1892
JAMES H. McKENNEY,
CLERK.

CASE No. 15,140.

IN THE

SUPREME COURT

—OF THE—

UNITED STATES.

OCTOBER TERM, 1892.

WILLIAM McPHERSON, Jr., et al,
Plaintiffs in Error,

vs.

ROBERT R. BLACKER,
Secretary of State of the State of Michigan,
Defendant in Error.

Term No. 1170.

ERROR TO THE SUPREME COURT of the STATE OF MICHIGAN.

Supplemental Brief of Henry M. Duffield,
for Plaintiffs in Error.

RAYNOR & TAYLOR, PRINTERS, 98-100 BATES ST.

IN THE

SUPREME COURT of the UNITED STATES.

OCTOBER TERM, 1892

WILLIAM McPHERSON, JR., et al, *Plaintiffs in Error,* vs. ROBERT R. BLACKER, Secretary of State of the State of Michigan, *Defendant in Error.*	*Term No. 1170.*

Error to the Supreme Court of the State of Michigan.

Supplemental Brief on the question of the Jurisdiction of this Court.

It has been intimated that an objection might be taken by the defendant in error to the jurisdiction of this Court. We can conceive of no tenable grounds for such an objection.

(1) That the proceeding is an application for a mandamus does not prevent this Court from entertaining this case on writ of error. A writ of mandamus is not in this country a prerogative writ, but, as expressed by Mr. Justice Taney in the opinion of this Court, in

Commonwealth vs. Dennison, 24 Howard, U. S. 66,

"is nothing more than an action at law between the parties * * the right to the writ and the power to issue it has ceased to depend upon any prerogative power, and it is now regarded as an ordinary process in cases where it is applicable. It was so held by this Court in the cases of Kendall vs. United States, 12 Peters, 615; Kendall vs. Stokes, 3 Howard, 100."

Under the 25th section of the Judiciary Act, the writ of error to a state court is given to review a "final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had" wherever a federal question exists and the writ "shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States."

In Memphis vs. Brown, 94 U. S. 715, this court held, that a judgment of a United States Circuit Court granting a mandamus "was such a final judgment as may be brought here for re-examination by writ of error."

And in Hartman vs, Greenhow, 102 U. S, 672, this court beld that the judgment in a proceeding for

a mandamus is subject to review on the same conditions as that in any other action. In this latter case, the Supreme Court of Appeals of Virginia had denied the writ, but the Supreme Court of the United States reversed that decision and decided that the petitioner was entitled to the writ of mandamus and remanded the cause to the state court for further proceedings in accordance with this opinion.

(2) That the case is in some of its aspects a political one, does not operate to defeat the jurisdiction of the court. While it is true that the decision of the court may have a political effect, the case involves the rights of persons and the fact that political questions may be involved will not deprive the parties of their right to invoke the jurisdiction of this court for their protection.

In Missouri, vs. Andriano, 138 U. S. 497, this Court held, Mr. Justice Brown rendering the opinion, that the claim of a person who had been elected sheriff of a county in Missouri to United States citizenship by virtue of naturalization through his father under the Act of Congress of April 14th, 1802, was "clearly a right or privilege claimed under a statute of the United States within the meaning of Revised Statutes Sec. 709, and had the judgment of the Supreme Court of Missouri been adverse to his claim, there could have been no doubt of his right to a writ of error from this Court to review its ruling."

In Boyd vs. Nebraska ex rel Thayer, 143 U. S. 136, a similar claim to United States citizenship was

set up by Boyd against whom a writ of quo warranto had issued out of a state court to establish Thayer's right to the office of Governor of that state. The state court rendered judgment of ouster against Boyd on the ground that at the time of his election he was not a citizen of the United States.

The Supreme Court of the United States, in an opinion by the Chief Justice, said, "arrival at this conclusion involved the denial of a right or privilege under the constitution and laws of the United States upon which the determination of whether Boyd was a citizen of the United States or not depended, and jurisdiction to review a decision against such right or privilege necessarily exists in this tribunal, Missouri vs. Andriano, 138 U. S., 497." "Each State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen and the title to office shall be tried, whether in the judicial courts or otherwise. But when the trial is in the courts it is 'a case,' and if a defense is interposed under the constitution or laws of the United States and is overruled, then, as in any other case decided by the highest court of the state, this court has jurisdiction by writ of error."

A mandamus issued to the state court in Virginia vs. Rives, 100 U. S., p. 314.

The action of State Legislatures on purely political questions such as the division of the state into senatorial and representative legislative districts has been reviewed by the courts when presented in a proper case.

In the Wisconsin gerrymander case, so-called, State vs. Cuningham, 51 North Western, 724, which was a bill in equity to restrain the official action of the Secretary of State.

In the Michigan gerrymander case, so-called, Giddings vs. Blacker, 52 North Western, 944, which was a petition for a mandamus to compel official action by the Secretary of State, and in People ex rel Pond vs. Board of Supervisors of Monroe County, 19, N. Y. Supplement, (Sept. 15, 1892,) p. 978.

(3) While a presidential elector may be a state officer, the sole function which he exercises is created by the constitution of the United States and the mode of his election (it is contended by the plaintiffs in error in this case) is prescribed by that instrument.

It seems too clear for argument that he is entitled to have the federal court pass on his claim to be voted for in accordance with the provisions of the constitution of the United States.

The case does not fall within the objection of the learned justice who delivered the dissenting opinion in Boyd vs. Thayer, which was based on the strictly state duties and relations of the office of governor of a state.

(4) This case involves no more danger of a clash of authority between the state and the federal court than any case which arises under Rev. Sts. 709. The decision of this court, if favorable to the plaintiffs in error, will not direct the issuance of a writ of mandamus to the Secretary of State of Michigan.

It will simply reverse the decision of the state court and remand the cause to be proceeded with therein in accordance with the opinion of this court. I submit that this court has full jurisdiction of the cause.

HENRY M. DUFFIELD,

Attorney for Plaintiff in Error.

Office Supreme Court U
FILED.
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IN THE

SUPREME COURT of the UNITED STATES.

OCTOBER TERM, 1892.

WILLIAM McPHERSON, JR., et al.,
Plaintiffs in Error,

vs.

ROBERT R. BLACKER,
Secretary of State of the State of Michigan,
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ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

Brief of Attorney General A. A. Ellis and John W. Champlin, Attorneys for Defendant in Error.

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THE PEOPLE, ex rel,
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ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

APPLICATION FOR A WRIT OF MANDAMUS.

BRIEF FOR DEFENDANT IN ERROR.

The relators in this cause obtained an order in the Supreme Court of the State of Michigan, against the defendant, to show cause why he should not be compelled by mandamus to give notice after the first day of July and before the first of September, under section 147 of Howell's Statutes of the State of Michigan, of the election of presidential electors.

The answer denied that he had refused to give

the notice, but alleged he had been willing to give the notice in the language of the statute.

Section 147 of Howell's Statutes referred to, so far as it is applicable to this case provides: "The Secretary of State shall, between the first day of July and the first day of September preceding a general election, direct and cause to be delivered to the sheriff of each county in this State, a notice in writing, that at the next general election there will be chosen as many of the following officers as are to be elected, viz, a governor, * * * electors of president and vice president of the United States, and a representative in Congress for the district to which each of such counties shall belong."

The real object of the proceedings by the relators, who claim to be nominees for the position of presidential electors, was to obtain an order of the Supreme Court declaring act No. 50 of the Public Acts of 1891 of the State of Michigan unconstitutional and void, so that their names might be printed on the general State ticket as electors, and they receive the votes of their party in all parts of the State.

The Supreme Court of the State of Michigan denied the writ, and as we claim might have denied the same without raising any Federal question.

Our colleague, Mr. Kirchner, has considered the preliminary questions and the right of appeal to some length in his brief, and we do not believe that any good purpose can be served by attempting to enlarge upon what he has said, and expressly insisting upon the position taken by him, we shall confine

our argument principally to the three main propositions made by the plaintiffs in error. The statutes in question are printed as an appendix to the brief of Mr. Duffield and we do not repeat them.

I.

First, It is claimed that Act No. 50 is repugnant to article 2, paragraph 2 of the constitution of the United States, in this, that said so-called act attempts to provide for the appointment of electors of President and Vice President of the United States, to which the State is entitled, by fractions of the territory of the State and by the votes of portions of the electors of the State, and not by the act of the State as a body politic as required by article 2, paragraph 2 of the constitution of the United States.

We deny that article 2, paragraph 2 of the constitution of the United States requires electors to be elected by a vote of the entire electors of the State.

On the contrary, we contend as a matter of law that under article 2, section 1, paragraph two of the constitution of the United States, the whole control of the manner in which electors shall be appointed is left to the legislature of the State, the power to be exercised as they may direct.

Said second paragraph of section one, article two of the constitution provides:

"Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of senators and repre-

sentatives to which the State may be entitled in the congress."

First, We desire to call the Court's attention to the fact that the literal reading of this clause does not call for "election" of electors at all; but it provides that they shall be "appointed."

And they shall be appointed in such a manner as the legislature may direct.

Under this clause the legislature may appoint them itself; it may delegate the power of appointment to the Governor, the Secretary of State; or it may provide that they be appointed by the people at large of the State; or they may appoint by districts.

It was not the theory of the framers of the constitution that the people should vote for president. They placed the choice of chief magistrate as far from the people as possible. They did not put it in the constitution that each state shall elect, but that each state shall appoint, and then left the method of appointment to the legislature. They could provide such manner as they chose—either election by general ticket, election by districts, election of persons from whom the legislature would appoint, appointment by the legislature.

Mr. Justice Strong, when commissioner, used this language in relation to this same clause (Vol. 5 Part 4, 44 Cong. 2 Session Electoral Com. 252.)

"The scheme of the constitution was to make the appointment of electors exclusively a state affair, free from interference of the legislative department of the government, excepting only that Congress

was permitted to determine the time for choosing electors, and the day on which they shall give their votes, with this limitation, that the day shall be the same throughout the United States. And it was ordained that no Senator or Representative shall be appointed an elector. * * *

"The truth is, the framers of the constitution seemed to never have contemplated the possibility of disputes respecting the appointment of electors, and hence they made no provision for the decision of such controversies. They were wise men, but they did not foresee everything. They would have been more than human if they had. I doubt whether they had in mind at all the idea of a popular election as a mode of appointing state electors. They used the word 'appoint' doubtless thinking the legislatures of the states would themselves select the electors, or empower the Governor or some other State officer to select them. The word appoint is not the most appropriate word for describing the result of a popular election. Such a mode of appointment, I submit, is allowable, but there is little reason to think it was contemplated, and still less reason to suppose that the idea of a contested popular election for electors had any existence in the minds of its framers when the constitution was formed. It was not until years afterwards that the electors were chosen by a popular vote."

Mr. Justice Miller, Commissioner, uses this language (Id. 256):

"The business of electing a President and Vice President, as it is laid down in the constitution, may

be divided into three distinct acts or stages of the grand drama. They are the appointment of electors, the voting of those electors, and the counting of their votes. The first of these acts or functions belongs by the constitution wholly to the States, 'who shall appoint in such manner as the Legislature thereof may direct' the number of electors to which the State is entitled.

" * * * This evidence of appointment must in its nature vary according to the manner in which the electors are appointed. If elected by the Legislature, as they may be, an appropriate mode would be the signatures of the presiding officers of the two houses to the fact of such appointment or a certified copy of the act by which they were elected. If appointed by the Governor, his official certificate with the seal of the State would be an appropriate mode. If elected by popular suffrage, that election should be ascertained and authenticated in the mode which the law of the State prescribes for that purpose."

In connection with the opinion of Justice Strong, above quoted, we desire to call the court's attention to article 1 of section 2 of the constitution:

"The house of representatives shall be composed of members chosen every second year by the people of the several states."

While the constitution provides that electors shall be appointed, it clearly provides that congressmen shall be elected.

The difference between the two offices, if an elector may be called an officer, is quite apparent.

One has a single function to perform, as soon as that is performed his duty and his office is ended. In fact, he is a mere agent or delegate, and has not any of the necessary qualifications to come within the definition of an officer. Under present practice he has no discretion whatever. The other is an officer for a given time with various duties and has some discretion.

And, notwithstanding the constitution expressly provides that congressmen "shall be elected by the people of the several states," for over fifty years it has been customary in all the states to elect them by districts, and nobody has ever imagined that the members elected in the districts of the State were not elected by the people of the State; yet it is now technically assumed by some, that an officer who is to be appointed "in such manner as the legislature may direct" should be elected by the people of the entire State.

The notion is simply absurd, and is born of the desire to foster or further some political preference, without any regard to the use of the English language, or the decision of eminent men concerning the construction that should be placed upon the constitution of the United States.

The question as to whether it is policy to delegate the authority to appoint electors to the several districts, and the question whether it is constitutional to so delegate the power, are two separate and distinct questions. It may not be policy to have the electors elected by districts, yet if the legislature has so directed, it is constitutional and the question

of policy has nothing to do with the question before this court.

To ascertain the meaning of this clause in the constitution, it will be proper to examine into the history of this clause, so far as it is developed in the constitutional debates, and the construction placed upon it by those who assisted in the adoption of the constitution.

When the article under consideration was first presented in the constitutional convention, it was section one of article 10 of the constitution.

See Journal of Federal Convention, 224.

The article provided that:

"The executive power of the United States shall be vested in a single person. His style shall be 'The President of the United States of America,' and his title shall be, 'His Excellency.' He shall elected by ballot by the legislature. He shall hold his office for the term of seven years; but shall not be elected a second time."

The legislature referred to in that section was the Congress of the United States.

Various amendments and changes were proposed to this section before it reached the form in which it was finally adopted. It was moved to strike out the word "legislature" and insert the word "people." The motion was lost. (Journal of Fed. Con., 286.)

It was also moved to amend by providing that they "Shall be chosen by electors to be chosen by

the 'people of the several states,'" and that motion was lost.) Journal of Fed. Con., 288.)

A little strange that the method which the relator now contends was adopted was in fact expressly negatived by the constitutional convention. These wise men, it would appear, did just what they intended not to do if relator's position is correct.

The mode that was in popular favor at that time was the district mode now contended for by the respondent.

President Madison writing upon this subject said:

"The district mode was mostly, if not exclusively, in view when the constitution was framed and adopted; and was exchanged for the general ticket and the legislative election as the only expedient for baffling the policy of the particular states which had set the example."

Writings of James Madison, Vol. III. 333-4.

The above quotation establishes two things:

1. That the district system was the system that was in view when the constitution was adopted.

2. That it was not changed because any one had an idea that there was anything unconstitutional about it.

Mr. Hildreth speaking of this same matter in his history, says:

"Three, or rather four, different modes of choosing electors of President and Vice President had been hitherto in use; a choice by the legislature, either by joint ballot or concurrent vote; an election by the people, by general ticket, the whole number of electors being voted for on one ballot throughout

the state; or a choice by districts. *The later method was evidently that which gave the fairest expression of public opinion, by approaching nearest to a direct vote.*"

And then he gives the reason, the same as given by Mr. Madison, for the change, as follows:

"But those states which adopted it were placed at the disadvantage of being exposed to a division of their strength and neutralization of their vote; while the electors chosen by either of the other methods voted in a body on one side or the other, making the voice of the state decisively felt. This consideration had induced the two leading states of Massachusetts and Virginia to abandon the district system."

The contemporaneous history is as follows:

At the first Presidential election in January, 1789, electors were chosen in ten states. In seven they were chosen by the legislatures, and in three by popular elections. In 1796 the electors of six states were chosen by popular elections, and in ten states by the legislatures. In 1824 the legislatures of six states chose the electors, and in all the other states there were popular elections. In 1832 South Carolina was the only state whose legislature made the choice, and she alone continued the practice until 1860. Among the states in which the selection was made by popular vote, two methods were in use. One by the general ticket, as is customary at present, the other by dividing the state into districts, the voters of each district choosing one or more electors. The states which preferred the district system, one after another adopted the general ticket, but as late

as 1824, Maine, Massachusetts, Maryland, Kentucky and Illinois elected by districts.

Different methods of division into districts were employed. In 1792 the legislature of North Carolina divided that state into four districts, and the members of the legislature residing in each district chose three electors. In 1828, electors were chosen by congressional districts in Maine and New York, and those thus chosen selected the two additional electors for each state. Maryland continued the district system until 1832. At one time the state was divided into a number of districts corresponding to the number of electors. Later the state was divided into nine districts, two of which chose two electors each, the remainder choosing one each. At another time the division was into four districts, the first choosing four electors, the second and third choosing two each, and the fourth choosing three.

The language used, "Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of senators and representatives to which the state may be entitled in congress," etc., is very clear and decisive, that it was the intention of the convention to give the absolute control of the appointment of electors to the state legislature.

Or, expressed in better language, in was the intention of the framers of the constitution to leave that power in the hands of the several states to be exercised in the manner the legislature of each state shall deem proper.

As said by McKnight, in "The Electoral System of the United States," page 37,

"The constitution is clearly a grant of limited powers to the United States; that is such powers as are vested in them by express terms, or by necessary implication. Therefore of necessity all other powers are retained by the people or the states respectively; there could be no other legal construction of the instrument."

And as expressed in the tenth amendment to the constitution:

"The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Speaking of the same matter in the House of Representatives, in 1800, Mr. Chas. Pinkney, who was one of the framers of the constitution, said:

"By the constitution, electors of the president are to be chosen in the manner directed by the State legislatures—that is all that is said. In case the State legislatures refuse to make these directions there is no power to compel them: there is not a single word in the constitution which can, by the most tortured construction, be extended to give Congress, or any branch or part of our federal government, a right to make or alter the State legislature's directions on this subject.

"The right to make these directions is complete and conclusive, subject to no control or revision,

and placed entirely with them for the best and most unanswerable reasons."

The Election System of the United States, McKnight, 377.

The question as to whether the legislature is, in any manner, limited in its right to control this matter is very tersely stated by Judge Cooley in an article in the Michigan Law Journal of February, 1892, page 6, where he says:

"The constitution does not in fact require that any note shall be taken of the popular will when the legislature proceeds to determine the manner in which presidential electors shall be chosen, and nothing but fear of popular condemnation can ensure its doing so. * * A little reflection must have convinced any fair minded person that by the most emphatic, as well as the most important act of sovereignty ever performed by the people of the American union, viz.: the adoption of the federal constitution, the choice of some method besides that of popular election had very plainly been made allowable."

Speaking of this same matter, Story on the Constitution (see page 304, 4th ed.) said:

"It is observable that the language of the constitution is, that 'each State shall appoint, in such manner as the legislature thereof may direct,' the number of electors to which the State is entitled. Under this authority the appointment of electors has been variously provided for by the State legislatures. In some states, the legislature have directly

Vermont they were chosen by the legislatures, and South Carolina continued this practice up to the war of the rebellion.

"Therefore, under the constitution as it now stands, it is in the power of any legislature to repeal all laws providing for the election of electors by the people, and take such election into their own hands. It may be said this is not likely to be done: but the answer is that it may be and that it has been done; and who can tell what may be the future exigencies of parties and politicians, or what they may not do? As has been already remarked, South Carolina chose electors by her State legislatures up to the period of the rebellion, and at all presidential elections prior to 1852 the electors were variously chosen—some by the legislatures in joint convention, others by the two houses, where they were divided in politics, acting separately and dividing the electors between them by contract. Other states chose electors by the general ticket system; others again by the single district system, and still others by the double or triple district system, that is, dividing the State into a smaller number of districts than there were members of Congress, and choosing two or three electors in one district."

In 1877 the question of the right of the Federal government, through the Congress of the United States or through a commission expressly provided for that purpose to interfere with the election of electors was fully and carefully considered by the electoral commission.

In discussion of the question there at issue, it

became necessary to discuss, to some extent, the meaning of article two, section two of the constitution; and every member of the commission that expressed any opinion concerning that matter, some ten in number, agreed to the construction now contended for by the respondent in this cause, and so far as the other commissioners are concerned, it was conceded that such was law.

Commissioner Morton, in consideration of the Florida case, said:

"As the appointment of electors is to be made by the states in such manner as the legislatures may provide, it is clearly within the powers of the states to provide for contesting the election of electors by the people or to correct any error or frauds in the return or canvass of the vote, provided such contest or correction is made before the 6th day of December, when the votes of the electors are to be cast; but, because the states have failed to make provision for such contest or the correction of frauds or errors, it is absurd to argue that the two houses of Congress or this commission may step in and do that which the states had power but failed to do. The powers of the two houses upon this or any other subject are not made to depend upon the failure of states to exercise their constitutional power, but depend upon the positive or implied grants of power in the constitution.

"The States have a distinct and clearly defined right expressed in the constitution, it is in their

perfect freedom from all outside interference in the appointment of electors."

See Vol. 5, Part 5, 44 Cong. Rec. 2d Session, Electoral Commission, 197.

(All the quotations from the opinions of the several commissioners are referred to in the above work, and I will only give the page in further quotations in such decisions.)

In considering the same question Commissioner Frelinghuysen used this language (Id. 204):

"The framers of the constitution, as its history shows, did first decide that the President and Vice President should be chosen by Congress; but on full debate and mature deliberation they saw the evil of placing one co-ordinate branch of government under the control of another—the Executive under the control of the legislative branch—and they determined that, except to prevent a failure to elect (in that event the House voting by *State* should elect), Congress should have nothing to do with the choice of President or Vice President. The constitution cast that duty on the States. It says that each State, large or small, shall have two votes, and also as many additional votes as it has representatives, and that each state shall appoint the electors in such manner as the legislature thereof shall direct. Under this power, the legislature might direct that the electors should be appointed by the legislature, by the executive, by the judiciary, or by the people. In the earliest days of the Republic, electors were appointed by the legislatures. In

Pennsylvania they were appointed by the judiciary. Now in all states except Colorado they are appointed by the people."

Mr. Frelinghuysen was supposed to be a first-class lawyer. He was Attorney General of the state of New Jersey from 1861 to 1868. He was United States Senator from 1868 to 1877, and was Secretary of State under President Garfield. He was certainly considered to be a man whose judgment upon the Constitution of the United States should be of some value.

Mr. Commissioner Hunton said (Id. 222): "It is conceded that the power to appoint belongs to the State."

Commissioner Hoar in discussing the same question used this language (Id. 240):

"Upon the whole matter therefore I am of opinion that the appointment of electors and the ascertaining who has been appointed is the sole and exclusive prerogative of the State. The State acts by such agencies as it selects."

Mr. Commissioner Garfield used this language (Id. 242):

"Every other act and fact relating to their appointment is placed as absolutely and exclusively in the power of the States, as it is within their power to elect their Governors or their justices of the peace. Across the line of these limitations Congress has no more right to interfere with the States than it has to interfere with the election of officers in England. To speak more accurately, I should say that the power is placed in the legisla-

tures of the States; for if the constitution of any State were silent upon the subject, its legislature is none the less armed with plenary authority conferred upon it directly by the national constitution."

Mr. Justice Field, Commissioner, expressed himself as follows (Id. 245):

"The constitution declares that each state shall appoint electors 'in such manner as the legislature thereof may direct.' It fixes the number to be appointed, which is to be equal to the whole number of Senators and Representatives to which the State may be entitled in Congress. It declares who shall not be appointed; that is, no Senator or Representative, or person holding an office of trust or profit under the United States. With the exception of these provisions as to the number of electors and the ineligibility of certain persons, the power of choice on the part of the state is unrestricted. The manner of appointment is left entirely to its legislature. * * *

Any substantial departure from the manner prescribed must necessarily vitiate the whole proceeding. If, for example, the appointment of electors should be made by the Governor of a state, when its legislature had directed that they should be chosen by the qualified voters at a general election, the appointment would be clearly invalid and have to be rejected. So, too, if the legislature should prescribe that the appointment should be made by a majority of the votes cast at such election, and the canvassers or other officers of election should declare as elected those who had received only a

plurality or a minority of the votes, or the votes of a portion only of the state, the declaration would be eqally invalid as not conforming to the legislative direction; and the appointment of the parties thus declared elected could only be treated as a nullity."

Mr. Justice Bradley, Commissioner, used this language (Id. 260):

"Each state has a just right to have the entire and exclusive control of its own vote for the chief magistrate and head of the republic, without any interference on the part of any other state acting either separately or in congress with others. If there is any State right of which it is and should be more jealous of any other, it is this. And such seems to have been the spirit manifested by the framers of the constitution. This is evidenced by the terms in which the mode of choosing the President and Vice President is expressed. 'Each State shall appoint in such manner as the legislature thereof may direct, a number of electors equal to the whole number of senators and representatives to which the State may be entitled in the Congress; but no senator or representative or person holding an office of trust or profit under the United States shall be appointed an elector. The electors shall meet in their respective States, and vote by ballot, etc.' Almost every clause here cited is fraught with the sentiment to which I have alluded. The appointment and mode of appointment belong exclusively to the State. Congress has nothing to do with it, and no control over it, except that, in a subsequent

clause. Congress is empowered to determine the time of choosing the electors, and the day on which they shall give their votes, which is required to be the same day throughout the United States. In all other respects the jurisdiction and power of the state is controlling and exclusive until the functions of the electors have been performed. So completely is congressional and federal influence excluded, that not a member of Congress nor an officer of the general government is allowed to be an elector."

We have already given the language used by commissioners Justice Strong and Justice Miller.

Col. Pickering, who was a member of the constitutional convention, writing in the later years of his life, said:

"In the mode devised by the National Convention, as exhibited in the constitution, it was presumed that the electors would consist of well-informed citizens, who should exercise their own judgments in selecting candidates for the offices of President and Vice President; but in practice that plan has become a *nullity*. The choosing of President and Vice President by the intervention of electors is a *mere farce*. The framers of the constitution, an assembly of really great men, that is, having among them some of the ablest and wisest men in the nation, seem to have thought the mode they prescribed for choosing the President and Vice President a sure way of placing in those offices able and faithful men, to the exclusion of all intrigue and cabal in the choice. It was, indeed, a pleasing theory, but

the experience of forty years has proved it to be visionary."

See Life of Timothy Pickering, Vol. III, 103.

The foregoing expresses fairly the intention of those who drafted the original constitution.

In whatever manner the persons were appointed by the states, they were presumed to have the right to act upon their own individual judgment.

Speaking of this same subject, Mr. Justice Miller (see Miller on the Constitution of the United States, 149--50) said:

"The manner of electing President of the United States was a subject of very grave consideration in the convention which framed the Constitution, and several propositions which had apparently at one time the sanction of a majority of that body were changed and modified before the final adoption of the rule here stated. As originally adopted, and as it now exists, it was supposed that the body of electors interposed between the state legislatures and the presidential office would exercise a reasonable independence and fair judgment in the selection of the chief executive of the national government, and that thus the evil of a president selected by immediate popular suffrage on the one side, and the opposite evil of an election by the direct vote of the states in their legislative bodies on the other, would both be avoided. A very short experience, however, demonstrated that these electors, whether chosen by the legislatures of the states, as they were originally, or by the popular suffrage of each state,

as they have come to be now, or by limited districts in each state, as was at one time the prevailing system, are always but the puppets selected under a moral restraint to vote for some particular person who represented the preferences of the appointing power, whether that was the legislature, or the more popular suffrage, by which the legislature itself was elected."

They admit that the constitution does not provide in express words that the appointment of electors shall be by a vote of the people entitled to vote. They admit that the constitution does not provide in express terms that all the electors shall be voted for upon a general ticket. But they contend that the clause should be construed and interpreted to read that the people of each state voting upon a general ticket shall elect presidential electors in such manner as the legislature may direct.

We deny that the constitution of the United States has such meaning. We deny that the language used is ambiguous or of doubtful meaning. At the outset it will be well to revert to certain well established principles bearing upon this branch of the case:

First. It may be conceded that a constitution is a law in the sense that it is a rule of action, differing from a statute in this, that in case a statute conflicts with its provisions, it overrides the statute.

Daily vs. Swope, 47 Minn., 367.
Endlich on Statutes, Sec. 506.

But constitutions deal with larger topics, and are couched in broader phrase than legislative acts, and their just interpretation is not always reached by similar methods.

A constitution owes its whole force to its ratification by the people; its language, therefore, is always to be taken in its plain, ordinary, natural and untechnical sense.

Gibbons vs. Ogden, 9 Wheat. 1, 188.
Hills vs. Chicago, 60 Ill. 86.
Springfield vs. Edwards, 84 Ind. 626.
Cronise vs. Cronise, 54 Pa. St. 255.
Weill & Kenfield, 54 Cal. 111.
Cooley Cons. Lim. 71.

The cardinal rule of construction concerning language is to apply to it that meaning which it would naturally convey to the popular mind in all cases when the propriety of such construction is not regulated by some settled rule of law.

People vs. Dean, 14 Mich. 406.

Constitutions are to be construed as the people construed them in their adopton, if possible; and the public history of the times should be consulted, and should have weight in arriving at that construction.

Bay City vs. State Treas., 23 Mich. 499.

Constitutions as well as statutes are to be construed in the light of previous history and surrounding circumstances.

Kennedy v. Gies, 25 Mich. 83.

Constitutional provisions must be interpreted with reference to the time and circumstances under which the constitution was formed, and the general spirit of the times and the sentiments then prevailing among the people.

People v. Harding, 53 Mich., 481.

When the language is plain and unambiguous neither interpretation nor construction are admissible.

It must also be presumed that the people who adopted the constitution understood the force and extent of the language used, and that the language has been employed with sufficient precision to convey the intent.

Henshaw v. Foster, 9 Pick, at page 316.
Hills v. Chicago, 60 Ill., 86.
Cooley Con. Lim., 68, and cases cited.

It follows that, where the words of a constitutional provision, taken in their ordinary sense, and in the order of their grammatical arrangement, embody a definite meaning which involves no absurdity or conflict with other parts of the same instrument; the meaning thus apparent on the face of the provision is the only one that can be presumed to have been intended, and there is no room for construction. It is not allowable in a constitution any more than in a

statute, to interpret that which has no need of interpretation.

Newell v. People, 7 N. Y., 9, 97.
Hills v. Chicago, 60 Ill. 86.
Springfield v. Edwards, 84 Ind. 626.
Cooley, Con. Lim. 68, 71.
Beardstown v. Virginia, 76 Ill. 34.

Nor can the inconvenience or hardship that may ensue the enforcement of a provision couched in such unmistakable language, justify its modification by construction, and no considerations of supposed public policy, nor of political expediency, or party success, can be regarded in arriving at the meaning. As was said in Weill v. Kenfield, 54 Cal. 111, "the whole line of argument is disposed of by the phrase '*Ita lex scripta est.*'"

"No canon of construction can justify us in adding to the constitution qualifying words of our own, suggested only by outside considerations, which may or may not have been of weight with the convention in framing, or the people in adopting, that instrument."

Wayne Co. v. Detroit, 17 Mich. 401.

It seems to us that the argument upon this point might well stop here. For does not the clause of the constitution under consideration in plain and ordinary language declare that each state shall appoint a number of electors in such manner as the legislature thereof may direct? It is conceded by

counsel for the relators, and indeed it is too plain for argument, that by the term state in this clause is meant the political body corporate, or as stated in Gen. Duffield's brief, "the body politic, the legal entity, which is the sovereign state." This legal entity, this body politic is called upon to do something—to act—and it must act through its agents. What agency is called upon to perform this act? It is not the Supreme Court, a co-ordinate branch of the government clothed with its judicial powers. It is not the executive, another co-ordinate branch, clothed with the duty of seeing that the laws enacted by the third co-ordinate branch are enforced, but that agency of the government in whom resides the sovereign power of the people, as representing them in all cases where the state as a state is to act or speak, that agency is the law making power, the legislature. The provision of the constitution does not execute itself. It requires legislative action to carry it into effect; this cannot be denied. Had the clause in such manner as the legislature thereof may direct been omitted, the legislature would have had to make the appointment, and having that power they could have exercised it in any manner they chose. But as the legislature, representing the state must appoint, the language was inserted, "in such manner as the legislature thereof may direct," making plain language still plainer if possible.

The language is so plain, so ordinary, so natural, that neither John nor Samuel Adams of Massachusetts misunderstood it, when, as soon as the consti-

tution was ratified, the state of Massachusetts proceeded to act under this clause, and appointed presidential electors in such manner as her legislature directed, and that was in the first instance by the legislature itself, and next that the voters of each congressional district should vote for three persons by districts from whom the legislature appointed the presidential electors equal to the number of representatives in congress, and two were appointed by the legislature without any nomination or vote of the people. It was so plain that Alexander Hamilton, Aaron Burr, Edward Livingston, Chancellor Kent and John Jay did not misunderstand its meaning, when as soon as the constitution was ratified the legislature of New York proceeded to choose the presidential electors without referring it to the vote of the people at all, and only failed of carrying it into effect through a disagreement of the manner of choice.

When political parties were contending for the ascendency in that State under the district system, when they were urging the legislature to change to a general ticket when they supposed a political advantage could be gained why did not they apply to the courts?

It was so plain that it was understood by the best legal minds in that state while passing through the most exciting political presidential elections in the history of the country, when the rejection of the vote of a single state which elected its presidential electors by districts would have changed the result. The language was so plain that New York as well

as other states for political reasons changed from appointing by the legislature, first to the district system, and then, for political reasons, to an election by general ticket. Is it not a little strange that Silas Wright, Wm. H. Seward, DeWitt Clinton, Talmadge and the many other giant intellects of those days should not have discovered that there was an ambiguity in the language of this article, and that it really meant that the appointment must be made by a vote of the electors of the whole state on a general ticket? Wilson of Pennsylvania was in the convention that framed the constitution, was one of the committee of five who reported the first draft, and was afterwards a Justice of the Supreme Court of the United States. Yet the language was so plain that Pennsylvania, after hearing a report from him as a delegate, ratified the constitution and proceeded to appoint presidential electors by the act of her legislature alone, but afterward adopted the district system, and later by a general ticket. In short, so plain was the language of the constitution that the state by its legislature might appoint, and that it was the sole judge of the manner of doing it, that each of the original states ratifying the constitution proceeded to make the appointment by its legislature at the first election for president, and after directed the manner of appointment as the legislature for political reasons deemed best.

So uniformly have the legislatures of the states of this union exercised the authority conferred by this section of the constitution to appoint in such manner as they deem best, ever since the constitu-

tion was adopted, that I should not treat the proposition as serious were it not advanced by so distinguished counsel as I see arrayed upon the other side.

If it be ambiguous we must recur again to those rules of construction which apply to written constitutions.

We have stated the general principle that the intent of a provision must be found in the instrument itself; that no effect can be given to an intention not expressed by its language, that the question for the interpreter is not what the framers meant, as distinguished from what the language expresses; but simply what is the meaning of the words, that if they convey a definite meaning, involving no absurdity, no contradiction of other parts of the instrument, that meaning apparent on its face must be adopted; and that where the text is plain and unambiguous, courts are not at liberty, in puting an intepretation upon it, to search for its meaning beyond the instrument itself, or to resort for that purpose to extrinsic facts and circumstances.

Endlich on Interpretation, Sec. 509.
Beardstown v. Virginia, 76 Ill. 34.
Hawkins v. Carroll Co., 50 Miss. 735.
Chesapeake, etc., R. R. Co. vs. Miller, 19 W. Va. 408.
Sturgis v. Crowningshield, 4 Wheat. 202.
Cooley, Con. Lim. 68.

If for the sake of the argument it be conceded that there is an ambiguity, and that the instrument is open to construction and interpretation then it is a

sound rule of construction that the previous history, the circumstances surrounding the foundation of the constitution are to be regarded by the courts, and courts will give weight to contemporaneous construction in the interpretation of constitutional provisions by those upon whom they are to operate.

Cooley Con. Lim. 81–85.
Bishop Written Law Sec. 104.
Sedgwick on Statutory and Cons. Law 552.
Stuart v. Laird, 1 Cranch 299.
People v. LaSalle, 100 Ill. 495.
Moers v. Reading, 21 Pa. St. 188–201.
State Line, etc. R. R. Co.'s Appeal, 77 Pa. St. 429.
Bingham v. Miller, 17 Ohio 445.
Johnson v. R. R. Co., 23 Ill. 207.
Howell v. State, 71 Geo. 224.
Baltimore v. State, 15 Md. 376.

Great deference is due to legislative exposition made contemporaneously with the establishment of the constitution. For it may well be supposed to result from the same views of policy and method of reasoning that prevailed among the framers of the instrument thus expounded.

Endlich Sec. 527.
Cronise v. Cronise, 54 Pa. St. 255–260.
Bingham v. Miller, 17 Ohio 445.

Applying these principles we find that in acting under this provision of the constitution all of the states which ratified the instrument, many of them with men in the convention that framed, were in

the conventions that ratified, and again in the legislatures which appointed the presidential electors, and with one or two exceptions the legislature of the states appointed under this provision of the constitution without any law of the state upon the subject. These states certainly regarded the injunction that each state should appoint, as a command to the legislature as representing the state to make the appointment. This is the natural meaning of the words, and if the legislature made no direction, it must make the appointment itself.

The voice of the legislature is the voice of the state. It is significant that the resolution of congress providing for the calling of the constitutional convention states the qualification of its membership in the precise words of the constitution, "who shall have been appointed by the several states;" and in exercising this power the legislatures of the respective states directly selected the delegates.

Jameson on Const. Conv., 150.

The state as a body politic is not gifted with the power of speech. The Delphic Oracle had indeed the semblance of man, and its voice determined the invasions of armies and the fate of nations. But though the head could be wagged and its mouth opened the oracular voice had to be furnished by a priest secreted within. So a state as a body politic, a legal entity, cannot act without the voice of the legislature expressed in solemn records. And when the legislature speaks the people have spoken

through their representatives. The history of the American commonwealths does not afford an instance where the people in their collective capacity have ever spoken or acted upon any question. If a constitution is to be framed it is done through delegates and submitted for ratification or rejection by some scheme of voting. They never have enacted a law, the highest act of sovereignty; this they have delegated to the legislature. Neither does the history of the American commonwealths afford an instance where the representatives to the legislature have been chosen or elected upon a general ticket. These representatives have always been chosen in districts, so that a majority of the legislature may not represent a majority of the electors of the state. And no one has ever supposed that the district representative system was either unrepublican or unjust. The idea of the state being a unit as expressing the majority of the voters, and thus the sovereignty of the people, has never prevailed or been practiced in this country save in Rhode Island, where if there is no majority no choice. The statutes of Michigan repudiate the idea that the majority of the people, or of the electors, represent the state. A plurality of votes elects although a minority of those cast.

We are cited to the language of Mr. Justice Iredell, 3 Dal. 93.

In the first place it is proper to say that Mr. Justice Iredell was not speaking for the court but for himself. Each Justice who sat wrote a separate opinion. Justice Iredell said: "My principles on

this subject" (the power of Congress before the confederacy) "are totally different from those which were the foundation of this opinion," (that the *Jus Belli* never was in any one of the states, and therefore it could not be delegated by any state to Congress) "and as it is a point of no small importance and I find on this occasion, as I have formerly done on others, considerable mistakes (as I concede) by very able men, I will endeavor to state my own opinion, etc. I find upon page 93 the extracts in quotations, and as I am requested in the brief to read page 93 I did so, and find Justice Iredell expressing himself thus: "In a republic all the citizens, as such, are equal, and no citizen can rightfully exercise any authority over another, but in virtue of a power constitutionally given by the whole community and such authority when exercised, is in effect an act of the whole community which forms such body politic. In such government, therefore, the sovereignty resides in the great body of the people, but it resides in them not as so many distinct individuals, but in their politic capacity only. Thus A, B, C, and D, citizens of Pennsylvania, and as such together with all the citizens of Pennsylvania, share in the sovereignty of the state. Suppose a state to consist of exactly 100,000 citizens, and it were practicable for all of them to assemble at one time and in one place, and that 99,999 did actually assemble: The state would not be in fact assembled. Why? Because the state in fact is composed of *all* the citizens, not of a part only." If my friend had been writing the opinion he would

have said, "not of vulgar fractions only—however large that may be, and one is wanting." "In the same manner £99 is not a hundred, because one pound is wanting to complete the full sum." Here is the embodiment of the idea of unity.

When we first came upon this argument against the constitutionality of the Miner law based upon the vulgar fraction idea, and the assertion that the word state meant the whole state and nothing less than the whole, and that the state meant the "people of the state" we were at a loss to know from what source the inspiration was derived. But we have it here in the opinion of Mr. Justice Iredell of South Carolina delivered in 1795 in the case of Penhallow vs. Doane's Admr. in admiralty. * * *

A doctrine which carried to its logical conclusion defeats the adoption of all constitutions, all laws, and all popular elections.

Is it any wonder, after such a lucid exposition of what a state is, that the judgment of the court in that case was "That against all the plaintiffs in error, except *George Wentworth*, $16,360 and 58 cents be recovered by the defendants in error, and the same sum against *George Wentworth* * * * and that in this court the parties pay their own costs."

Perhaps in justice to Mr. Justice Iredell we should state that upon page 94 which we were not asked to read, he says that by the common consideration of mankind they have long "practiced upon the principle that *the majority shall bind the whole*, and in large countries, at least, that representatives shall be chosen to act on the part of the whole.

But where they do so, they decide for the whole, and not for themselves only. Thus, when the legislature of any state passes a bill by a majority competent to bind the whole, it is an act of the whole assembly, not of the majority merely. So when the court gives a judgment by the opinion of the majority, it is the judgment in a legal sense of the whole court. So I conceive, when any law is passed in any state, in pursuance of constitutional authority, it is a law of the whole state, acting in its legislative capacity."

We find no fault with this exposition of the power of the majority to bind the minority in a representative form of government, but it must be remembered that this argument is made by Gen. Duffield and his associates in behalf of the relators on the above general principles, of the right of the majority of the people of the state as expressed by their ballots. Neither the constitution of the United States nor this State bears upon or touches this subject. The contention is for the right of the majority of the voters to choose presidential electors, because they and they alone represent the state in its political capacity. It is not a minority of all the voters, a vulgar fraction of the people, less than half. If this principle should be adopted by your honors the Republican electors at large in Michigan would be "hoist by their own petard," for it has been many years since the Republican candidates of that state have been elected by a majority of all the voters.

Let us go back ten years:

1882.	Whole number of votes cast for Governor	308,769
	A majority would be	154,385
	Republican vote	149,764
	Less than a majority	4,378
1884.	Whole number of votes cast for Governor	389,934
	A majority is	194,968
	Republican vote	180,840
	Less than a majority	14,128
1886.	Whole number of votes cast for Governor	386,690
	A majority is	190,346
	Republican vote	181,474
	Less than a majority	8,872
1888.	Whole number of votes cast for Governor	474,775
	A majority is	237,388
	Republican vote	233,595
	Less than a majority	3,793
1890.	Whole number of votes cast for Governor	379,809
	A majority is	198,905
	Republican vote	172,205
	Less than a majority	26,700

Let it be granted that the state is a corporate entity and that the people who exercise the elective franchise are the state, and the logical consequence is the same. The state must appoint, that is, according to the argument advanced, the people

must appoint. How can, how must the people under a representative republic act? They act through their representatives, duly elected to the senate and house of representatives. If the constitution gave to the legislature no discretion as to what manner the electors should be chosen, it necessarily must have been done by the legislature as the authority which represents the state, in all cases where the state is called upon to act or speak. The people are then, through their legislature, to make choice of the electors, but the constitution has said the manner in which this choice may be made, may be directed by the legislature, that is the method of effecting this object. Hence it follows, that the legislature in directing the method may pass a law requiring the election of electors by districts or by a general ticket; and they may carve out such districts as they choose, make them large or small; or the legislature may provide that the legislature itself may choose the electors by joint ballot, by concurrent vote or by separate vote of the two branches of the legislature. Whatever is done by the legislature, or by or through its authority, is done by the state.

The act of the legislature is the act of the people through their chosen representatives.

The constitution grants the power and it is without limitation or restriction.

Why, it is asked, if the legislature was to appoint for the state did it not read, each legislature shall appoint in the manner, etc.

Simply for the sake of euphony.

The legislature acts in a dual capacity, it represents the state in appointing and it provides the manner.

Counsel point to several clauses in the constitution where the word "state" is used to show that the corporate entity is meant when the word "state" is used, and that when citizens of a state is referred to, or the people of the state, the constitution refers to them in terms. (Duffield's brief). We quite agree with this view. Indeed counsel for respondent have never entertained any other view. And applying the distinction pointed out as manifesting the intent of the constitution, it is worthy of note that the clause under consideration (Art. 2, Sec. 2) does not read that the people of the state shall appoint, or the citizens of the state shall appoint, but "each state shall appoint." It is true that the state is called upon to do something, but it is called upon as an organized political body. A "legal entity," in the language of our brother Duffield is "an artificial being," which like all corporations or artificial beings, must speak and act through authorized agencies. What agent is authorized to speak or act for a state? It is the legislature, the law-making power, the representative body which exercises the sovereignty of the state. The people can never act in a sovereign capacity, except through their representatives in the legislature. It is the legislature which enacts laws, and which authorizes contracts. If the state was not prohibited from entering into treaties, contracting alliances, etc., what agency would act for the state in performing such acts?

What if the state laid duty on tonnage? In short it may be laid down as elementary and axiomatic that unless the constitution of the state confers authority upon some other agent in express terms, the legislature is the only agent that represents the state whenever the state is called upon to do anything.

In Ordronaux's Constitutional Legislation at page 345, the author says, "Tracing the growth of legislative bodies from those primary assemblies of the people whose omnipotence we have elsewhere adverted to, it follows as a logical inference, that the legislative power has always been regarded by writers upon government as the supreme authority in the state. And of necessity it must be so in a representative democracy—

"*First*, Because it represents the direct will of the people exercising their executive power of self-government in a public assembly, and

"*Second*, Because it is the organ through which that will is promulgated in form of a written law."

The clause of the constitution quoted contemplates, indeed *requires*, legislative action, and it would, had the clause entirely omitted the words "in such manner as the legislature thereof may direct."

Had it read "each state shall appoint a number of electors equal" etc., the legislature alone could have made the appointment as the body representing the sovereignty of the state and authorized to speak for it. The constitution did not take away

its authority by enlarging its power to make such appointment in any manner it might direct.

It is not contended that the state need not appoint the electors. It is contended that the state may make such appointments in such manner as the legislature thereof may direct: and that by the provisions of Act No. 50 they have directed that the appointment shall be made by plurality vote of electors voting, by districts.

Every elector under this law has the right to vote for two electors and two alternates for the electoral colleges. In this respect they are placed upon an equal footing.

But it is claimed that each voter has a right to vote for all the presidential electors. From whence is this right derived? Certainly not from the language of the constitution, which gives to the legislature plenary power over the manner of appointing. In the exercise of this power the legislature need not have given any voter the right to vote at all in the choice but may have exercised the choice itself as the body representing the State.

"It is worthy of note that nowhere in the constitution is any reference made to 'districts' either congressional or otherwise. The earliest allusions in Federal legislation was the act of Congress of 1842, 5 U. S. St., 591, which required for the first time in the history of the country for the election of members of Congress by districts."

It is indeed worthy of note, and one of the strongest arguments that can be made against the position now assumed by the counsel for the relat-

ors. Art. 1, Sec. 2 enacts that: "The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature."

Here the argument so strenuously insisted upon by the relator's counsel would be entitled to some consideration if applied to this provision of the constitution. The provision is that the members shall be chosen by the people of the several states, not by a portion of the people in a fraction of the territory of the state. Here they might well assert that the language not only implied but expressed that the choice should be by the people of the state acting in their sovereign capacity, that each elector had a right to a voice in all the members who should represent him in the national legislature, and "not thirteen wards in Detroit, which have no autonomy, which have had no common head; no power even to record their own action, which cannot compel the obedience of any one, which are in no sense related except that their territory is contiguous." Duffield's brief. Let us pursue these provisions relative to choice of representatives further, for it will throw a flood of light upon the proper construction of the instrument and the utter fallacy of the construction contended for by relator's counsel. The section further provides that "when vacancies happen in the representation from any state the executive authority thereof shall issue writs of election to fill such vacancy." Here again nothing is

said about districts, but only the state is recognized, "the great political corporation with imperial prerogatives and powers." As well might it be argued, and better, because the constitution says the *people shall choose;* that nothing less than the whole people voting on a general ticket for all the representatives is the only constitutional method of choosing members of the house of representatives.

Then comes Sec. 4, which provides that: "The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators."

Every tyro in the history of this country knows that since the formation of this government the people have voted for representatives in Congress under this clause by districts, by fractions, yes vulgar fractions of the people and in portions of the territory, and not on a general ticket. Is this contemporaneous and uniform construction that representatives may be voted for by districts and not as a unit either as to territory or number, to have no right in determining the unit idea and general ticket when applied to electors? Not questioned, but recognized by Congress and by the whole people of the United States. It proves that the voice of the people can be expressed as well by districts as by states. A representative is a representative of the people of the United States.

"A legislature in our republican system of gov-

ernment is a representative body. Its power is delegated by a charter from the people—a constitution."

Sutherland on Stat. Con. Sec. 29.

"By this grant the whole law-making power was transferred from the people to the Senate and House, subject only to the limitations and restrictions contained in the constitution of the United States, and in this constitution."

The legislature may create subordinate bodies with certain powers, and delegate certain powers which it may recall at pleasure.

People vs. Collins, 3 Mich. 343-9.

"And subject to those restrictions and limitations the power of the legislature to enact binding laws seems not to be limited."

Scott vs. Smart's Executors, 1 Mich. 307.
Williams vs. Mayor, 2 Mich. 560.
People vs. Gallagher, 4 Mich. 244.
People vs. Collins, 3 Mich. 343.
Sears vs. Cottrell, 5 Mich. 255.

The state can be recognized by the courts as a suitor in legal proceedings only through the agents or legal representatives appointed by law, and the appearance of the proper representative can only be attested by the record:

People vs. Navarre, 22 Mich. 1.
Benalleck vs. People, 31 Mich. 200.

The word "State" in the Federal constitution is used in four or five different senses.

Texas vs. Wright, 7, Wall. 700.

In reply to the play on the word "State" I refer the court to the clause in article one section ten: "No State shall make any law impairing the oblitions of contracts."

The word State in this clause is used in the sense of "legislature of a State" and as a prohibition against the State legislature, and prohibits the legislature from directly or indirectly making such a law. It extends to a city ordinance.

Saginaw Gas Light Co. vs. City of Saginaw,
28 Fed. R. 533.
Wright vs. Nagle, 101 U. S. 791.

A further doctrine that has been advanced by some persons relative to the construction that should be placed on Article two, Section two of the constitution, is the new doctrine of constitutional creation by prescription.

Where there are different constructions that may be placed upon the language of the constitution, and there is doubt as to some particular method as to whether that is covered by the constitution or not, a long continued construction in that particular way may be used to establish the fact that such a construction may be tolerated, but it cannot be used against the plain language of the constitution to

negative the idea that some other way would not be lawful under the constitution.

The power to appoint electors cannot be abdicated by any law of Congress; and the state, neither by its laws nor by its constitution, can abdicate the right of the legislature of the state to control that matter.

It appears to me that the following, taken from the report of the Senate Committee relating to the amendment to the constitution in this regard above quoted, and here repeated, is good law:

"This power is conferred upon the legislature of the State by the Constitution of the United States, and cannot be taken from them or modified by their State constitutions any more than can their power to elect Senators of the United States. Whatever provisions may be made by statute or by the State constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated."

It was urged in the Supreme Court of the State of Michigan that notwithstanding the fact that this constitutional provision was interpreted when it was adopted as giving authority to the State legislature to appoint the electors, that now after so many years acquiescence on the part of the several states, that that construction could not longer be given it, they would recognize and acknowledge a constitutional growth, that by reason of the advancement of the times, the improvement in political methods, and the general disregard of the opinions of the fathers, the constitution of the United States should

now be entitled by reason of its growth to a different construction.

We have not been favored with the brief of the attorney who made this argument in the Supreme Court of the State. And, not knowing whether such a position will be urged before this court, and having but very ltttle respect for such an opinion, we shall not take any time to argue that the constitution must be interpreted to mean today what it meant at the time it was adopted.

II.

It is next alleged that Act No. 50 is repugnant to the fourteenth amendment to the constitution of the United States, in that it deprives the male inhabitants of the United States of the right to vote at an election for choice of electors of President and Vice President of the United States, and abridges the same for causes other than participation in the rebellion or other crimes.

The fourteenth amendment to the constitution was passed and finally ratified in 1868. It has no reference or application whatever to extending the right of suffrage, and does not attempt in any manner to bestow the right of suffrage on any person.

Minor vs. Happersett, 21 Wall. 162.

The fifteenth amendment was passed in 1869, and expressly denies the right to the states of the power to abridge the right of suffrage on account of "race, color or previous condition of servitude."

The clause in the fourteenth amendment to the constitution to which the relators evidently refer reads as follows:

"Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State."

In discussing this matter (see Story on the constitution, 2 Vol. 678) it is said:

"This article it will be remembered, was adopted before colored persons generally were admitted to the privileges of suffrage, and this section thereof was intended to preclude the states which denied them that privilege from having the benefit of their numbers as a basis for representation. It will be manifest from its terms that the immediate occasion for its adoption passed away on the ratification of the succeeding article, and its importance, if any, will depend upon future events."

There can be no doubt that the reason above stated is correctly given. There is nothing in this clause that prohibits the states from denying the right of suffrage, but in case they do deny it, by reason of property qualification, or for any other reason, other than those reasons named in the section, they shall be denied so much of their representation.

The very inference upon the face of it is that the state shall have the right to control the right of suffrage.

The fifteenth amendment is entirely different. So far as it applies it is absolute in its provisions.

It is plainly held in the case of United States vs. Reese, et al, 92 U. S. 215, that:

"The power of Congress to legislate at all upon the subject of voting at State elections rests upon the fifteenth amendment, and can be exercised by providing a punishment only when the wrongful refusal to receive the vote of a qualified elector at such election is because of his race, color, or previous condition of servitude."

The argument contended for by the relators is that, inasmuch as the citizens of this State have heretofore voted for the whole number of electors they, by force of this constitutional amendment, have a right to continue, and will be deprived of that right, if only a portion are allowed to be printed upon the ticket in the several districts. A doctrine so absurd that only extreme exigency could have ever suggested such a foolish idea in the courts of the State.

"No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States."

This clause has no application whatever to the controlling of the elective franchise of the citizens of a state, or to the abridgement in any manner of the rights of a citizen of the state.

Minor vs. Happersett, 21 Wall. 162.

In discussing that question the Supreme Court of the United States in the Slaughter House Cases, 16 Wal. 74, make a distinction between a citizen of the United States and a citizen of the State. They use this language:

"It is quite clear, then, that there is a citizenship of the United States and a citizenship of a State, which are distinct from each other, and which depend on different characteristics or circumstances in the individual.

"We think this distinction and its explicit recognition in this amendment of great weight in this argument, because the next paragraph of this same section, which is the one mainly relied on by the plaintiffs in error, speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several States. The argument, however, in favor of the plaintiffs rests wholly on the assumption that the citizenship is the same, and the privileges and immunities guaranteed by the clause are the same.

"The language is: 'No state shall make or enforce

any law which shall abridge the privileges or immunities of citizens of *the United States*.' It is a little remarkable, if this clause was intended as a protection to the citizens of a state against the legislative power of his own state, that the word citizen of the state should be left out when it is so carefully used and used in contradistinction to citizens of the United States in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose.

"Of the privileges and immunities of the citizens of the United States, and of the privileges and immunities of the citizen of the state, and what they respectively are, we will presently consider; but we wish to state here that it is only the former which are placed by this clause under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment."

The fallacy of the relators' position lies in the assumption that the exercise of the elective franchise is the right or privilege of a citizen of the United States.

The constitution permits Congress to confer citizenship, and by the 14th amendment it is defined, but the right of voting is not a part of the definition. This right is left where it always existed, with the states. The right of voting is not an inherent right, but a privilege bestowed by the State constitution upon such portion or class of its citizens as it con-

ceives conducive to the public good. The right may be extended or it may be taken away from certain persons or classes by amendment of that instrument.

The construction contended for by counsel for the Republican candidates would make the statutes of the state like the laws of the Medes and Persians—unchangeable. Election laws, ballot reform, school laws.

What are privileges and immunities? Monopolies are privileges; franchises of corporations, the right of taking toll for passing over turnpikes, plank roads, bridges or ferries are all privileges. Immunities are special exemptions from public burdens, such as taxes, military or jury services and the like. It was never the intention of this provision of the constitution to exempt individuals from the operation of general laws, or to prohibit the legislature from enacting laws which should operate upon all alike.

Civil Rights Cases, 109 U. S. p. 24.

In the Slaughter House cases the legislature, after granting a monopoly, attempted to repeal the charter. Here a privilege had been granted, and the legislature sought to take it away.

What were the civil rights cases? They arose under the civil rights legislation by Congress. One person claimed the privilege of riding in a parlor car, another the right to sit among white people in a theater, another to be admitted into a hotel, etc.

The court held the first and second sections of the civil rights act unconstitutional and void.

Missouri vs. Lewis, 101 U. S. 22. Error for refusing mandamus. Relator had been disbarred and claimed a *right of appeal* to supreme court.

The next fallacy is that because the former law authorized the electors of the state to vote for all the presidential electors upon general ticket, the law authorizing such vote upon general ticket constituted a privilege protected by the 14th amendment.

As well contend that the privileges of the citizen are abridged because he cannot vote for *all* the Representatives in Congress. Electors and Representatives in Congress are placed upon the same footing in the second clause in the 14th amendment.

This amendment has no reference to voters or the elective franchise in the first paragraph. The second impliedly admits the right of the state to regulate the elective franchise, by saying if the state does so the basis of representation shall be reduced proportionately.

The contention of the Republican nominees is not that any voter is disfranchised from voting for presidential electors, but that all voters in the state are of right entitled under the 14th amendment to vote for all the electors. I deny that the amendment gives or guarantees any voter the right to vote. Who shall vote is left with the state. Who shall be deemed citizens is settled by the 14th amendment. Citizens of the United States and voters of the state are not the same. A citizen of the United States and of the state is a person born or natural-

ized in the United States and subject to the jurisdiction thereof. The last clause excludes aliens, children of ambassadors, etc., born within the jurisdiction of the United States. Voters in Michigan has a much broader meaning. Here a person may vote before he is naturalized, before he is a citizen, if he has declared his intention to become a citizen and resided in the United States two years and in the state six months after he has declared his intention and previous to an election. Such a voter is not within the terms or meaning of the constitutional amendment. He is not a citizen of the United States or of a state, and yet he has just as much right to vote under the privilege conferred by the constitution of this state for all the electors as a citizen of the United States has. Under the relator's theory, here is a large class of voters not protected in their privileges and immunities by the 14th amendment.

The fact is, and the law is, that the 14th amendment has nothing whatever to do with the right of the individual, whether a citizen of the United States or otherwise, to vote for presidential electors or any other officer, but if the right of a citizen of the United States to vote is abridged or denied to any male citizen of the United States, then the basis of representation to which each state is entitled in the Congress shall be reduced proportionately.

If the constitution of the United States had provided that the electors should be elected upon a general ticket, then each voter would have had a con-

stitutional right to vote for the whole number. But it not only does not contain that provision, but it confers upon the legislature of the state the power to make the appointment in such manner as they may direct. In order to carry out his theory, and it is necessary to his purpose, Gen. Duffield says the fourteenth amendment wipes these words from the constitution. This is a summary method of getting rid of a troublesome provision of the constitution.

The fourteenth amendment does not mention the second article, but the second section does amend article 1 of the constitution relative to the basis of representation in Congress. It is not inconsistent with the provisions of article 2. Had the first article embodied the amendment with reference to the basis of representation, it would have been in perfect harmony with article 2, section 2, relating to the manner of appointing presidential electors.

It was not the theory of the framers of the constitution that the people should vote for President. They placed the choice of chief magistrate as far from the people as possible. They did not put it in the constitution that each state shall elect, but that each state shall appoint, and then left the method of appointment to the legislature. They could provide such manner as they chose—either election by general ticket, election by districts, election of persons from whom the legislature would appoint. appointment by the legislature.

Gen. Duffield, says: "The electors of President and Vice President must be chosen by the votes

of the citizens at an election for that purpose. There cannot be any other construction of the words 'the right to vote at an election for the choice of electors for President and Vice President of the United States.'" And he again says: "In other words, that the amendment *ex proprio vigore* prohibits any state from authorizing any manner of voting by means of which the citizens' right to vote for electors of President and Vice President may be abridged and the state's representatives in Congress be unaffected by the penalty." He further says: "Neither can it justly be claimed that because the penalty does not seem to apply to a law like that of Michigan, therefore such a law is not within the amendment." He states his claim and then makes this suggestive answer, one calculated to inspire the court with the fear of the consequences, viz., "that the penalty might possibly apply and deprive Michigan of all representation."

Michigan might lose all its representation in Congress, because each citizen of the United States is denied the right to vote for all the presidential electors! But this deprivation of representatives applies to acts other than the right to vote for presidential electors. It is incurred equally when the right to vote for the executive and judicial officers of the state is denied to any inhabitant of the state, twenty-one years old and a citizen of the United States.

Let us apply this doctrine to such of the States as do not permit any person to vote for judges, and some executive officers, at any election, and see how

many states will be deprived of all representation in Congress.

JUDGES.

Vermont—The judges are elected by the legislature.

Connecticut—The judges are elected by the legislature.

Rhode Island—The judges are elected by the legislature.

South Carolina—The judges are elected by the legislature.

Georgia—The judges are elected by the legislature.

New Jersey—Nominated by the Governor and confirmed by the senate.

Mississippi—Nominated by the Governor and confirmed by the senate.

Florida—Nominated by the Governor and confirmed by the senate.

Louisiana—Nominated by the Governor and confirmed by the senate.

Virginia—By the legislature in joint convention.

Massachusetts—Nominated by Governor and confirmed by council.

EXECUTIVE OFFICERS:

New Jersey—Treasurer and Comptroller appointed by legislature, Attorney General by Governor and confirmed by senate.

Pennsylvania—Secretary of State and Attorney General appointed by Governor and confirmed by senate.

Maryland—Secretary of State appointed by Governor, Treasurer elected by legislature.

Delaware—Secretary of State appointed by Governor, Treasurer elected by legislature.

Kentucky—Secretary of State appointed by Governor, Treasurer elected by legislature.

West Virginia—Secretary of State appointed by Governor, Treasurer elected by legislature.

Florida—Secretary of State appointed by Governor, Treasurer elected by legislature.

New Hampshire—Secretary of State and Treasurer by legislature by joint ballot, Attorney General appointed by Governor and confirmed by Senate.

Maine—Secretary of State and Treasurer by legislature by joint ballot, Attorney General appointed by Governor and confirmed by Senate.

Virginia—Secretary of State and Treasurer by legislature by joint ballot, Attorney General appointed by Governor and confirmed by Senate.

Tennessee—Secretary of State and Treasurer by legislature by joint ballot, Attorney General appointed by Governor and confirmed by Senate.

American Statute Law by Stimson.

What will good old staid Massachusetts say when it takes up the telegraphic dispatches announcing a decision of this court that any state which denies the right to vote at any election for the choice of presidential electors, executive or judicial offices, forfeits their right under the fourteenth amendment to any representation in the congress. This throws out representatives from eleven states that appoint

their judiciary, and eight other states that appoint executive officers. Held further that voting for congressmen by districts is electing them by the people, but appointing presidential electors by voting for them in districts at the same time and place and in the same manner that representatives to congress are elected is not an election by the people. Held further that the constitution of the United States, providing that each state shall appoint in such manner as the legislature thereof may direct a number of electors, equal to the whole number of senators and representatives, is mandatory upon the legislature to appoint only in one manner and that is by a general election wherein each voter shall vote for the whole number of electors on one ticket. In this way no presidential elector is left behind in the race and the state votes as a unit. The Miner law knocked out.

This portion of the amendment was only designed to preserve to every citizen an equality of rights with every other citizen and to prevent discrimination as between citizens. If no presidential electors are elected, but the appointment is made by the legislature, no discrimination is made. If they are elected in districts where each citizen has an equal right to vote the same as any other citizen has, no discrimination is made and there is no violation of the 14th amendment.

The only reasonable conclusion that can be reached in my judgment is that plenary authority is vested in the legislature of each state to determine the manner of appointing presidential elect-

ors. The exercise of that power becomes a political question and not a judicial one. The position assumed by the relators is that there is but one method of electing presidential electors and that is by a vote of the electors, or as they put it, citizens upon a general ticket. If this be so, the legislature has no discretion and the words of the constitution are given no force or effect. There is absolutely no warrant in the constitution for such position. The constitution having vested that authority in the legislature, can this court, or any other, step in and exercise that authority? We do not read the constitution as saying that such state shall appoint in such manner as its supreme court of the United States or the state may direct a number of electors, equal, etc. Can your discretion be substituted for theirs?

The right and authority of the legislature of the State of Michigan to speak on behalf of the State, and to say how the electors should be chosen has been passed upon by the Supreme Court of that State. And the Supreme Court of the State of Michigan have held that the action under the laws of the State, by electors of a district, when acting within the law passed by the legislature, were acting for the State, and it was a proper use of State authority.

The Supreme Court of the State of Michigan, having passed upon the right of the people, through its legislature, to speak as a State by electors chosen by districts, it should be conclusive under the constitution of the State of Michigan.

We respectfully refer the Court to the opinion delivered in this case, and which is printed at large in the record, and we hereby expressly refer them to the opinions and reasons there advanced by the Supreme Court of the State of Michigan, and rely upon the same as though they had been repeated in this brief.

III.

It is also alleged that said "Act No. 50 is unconstitutional and void because in conflict with the provisions of an act of Congress, approved February third, 1887, which requires that the electors of each state shall meet and give their votes on the second Monday in January next following their appointment, etc."

It will be observed that the only conflict between the state law and the United States law is in reference to the day when the electors shall meet. The United States law relative to the time of meeting was formerly the same as Act 50, which reads the same as section 241 of Howell's Statutes. In 1887 Congress changed the time so as to make it in January, as indicated in the objection.

By an examination of the matter it appears that under article two, section four, of the constitution of the United States, Congress may determine the time of choosing the electors, and the day on which they shall give their votes, which day shall be the same throughout the United States.

We have assumed the legislation, however, upon both of these subjects, and there is no prohibition

against the legislature of the state passing laws covering the same matter; but if these laws passed are in conflict with the United States law, so far as the same matters in conflict are concerned, the United States law must govern, and so much of the state law would be nugatory, but it would not affect any other portion of the same act.

In the case of Huston vs. Moore, speaking of a case where there is no prohibition to the state legislature upon such a subject (see 5 Wheat, 49), Judge Story uses this language: "There is this in reserve, however, that in cases of concurrent authority, where the laws of the states and of the Union are in direct and manifest collision on the same subject, those of the Union being 'the supreme law of the land,' are of paramount authority, and the state laws, so far, and so far only, as such incompatibility exists, must necessarily yield."

In the case of Robinson vs. Rice, 3 Mich. 242, our Supreme Court used this language:

"It seems to be admitted that an affirmative power in Congress is not necessarily incompatible with a like power in the states, but in the exercise of these powers by the two governments if there be a conflict between them, the law of the State must give way. To the extent of the interference, its operation is suspended. So far there appears to be no difficulty in laying down a clear rule."

There does not appear to be any conflict in the authorities that so far as the day is different from that fixed by the Congress of the United States, the law would be inoperative.

The law is not necessarily inoperative *in toto* because in some of its provisions the legislature has exceeded its power. On the contrary the rule is stated to be that the unconstitutionality of one part of the statute can not defeat other portions unless the nature of the unconstitutional provision is such as to render it of vital importance to the law.

People vs. Mahaney, 13 Mich., 431.
People vs. Richmond, 59 Mich., 570.
Att'y Gen. vs. Amos, 60 Mich., 372.
Robinson vs. Miner, 68 Mich., 549.

We respectfully urge that the opinion of the Supreme Court of the state of Michigan denying the writ in this case should be affirmed with costs to the appellee.

We attach hereto an historical statement showing the contemporaneous construction of the constitution as it bears upon this question.

A. A. ELLIS,
Attorney General.
JOHN W. CHAMPLIN.

HISTORICAL.

When the constitution of the United States, agreed to in convention on September 17, 1787, was reported to the Congress of the Confederacy it was accompanied by these resolutions:

Resolved, That the preceding constitution be laid before the United States in Congress assembled, and that it is the opinion of this convention that it should afterwards be submitted to a convention of delegates chosen in each State by the people thereof, under the recommendation of its legislature, for their assent and ratification, and that each convention assenting to and ratifying the same should give notice thereof to the Congress of the United States assembled.

Resolved, That it is the opinion of this convention that, as soon as the conventions of nine states shall have ratified this constitution, the United States in Congress assembled should fix a day on which *electors* should be *appointed* by the *states* which shall have ratified the same and the day on which electors should assemble to vote for the President, and the time and place for commencing proceedings under this constitution; that after such publication the *electors should be* APPOINTED, and the senators and representatives ELECTED; that the electors should meet on the day fixed for the election of the President, and should transmit their votes certified, signed, sealed and directed as the constitution requires, to the Secretary of the United States in Congress assembled, and that the senators and representatives should convene at the time and place assigned; that the senators should appoint a president of the senate for the sole purpose of receiving, opening, and counting the votes for President, and that, after he shall be chosen, the Con-

gress together with the President should, without delay, proceed to execute this constitution.

By the unanimous order of the convention.

GEORGE WASHINGTON, *President.*

W. JACKSON, *Secretary.*

I Elliott's Debates, 52.

It was submitted by Congress to the several states, with the resolution and the explanatory letter from George Washington, and was ratified by the requisite number of states.

I quote from Hildreth's History of the United States, Vol. I, second series, at page 39: "In all the ratifying states, New York excepted, presidential electors were duly appointed. In Virginia the choice was given to the people, the state being divided into districts for that special purpose. In Massachusetts the people of each congressional district were authorized to nominate three candidates, from whom the legislature was to elect one, besides two additional electors to be chosen by the citizens at large. Generally the choice was by the State legislatures; in some states by concurrent vote of the two branches; in others by joint ballot.

"The electors thus chosen met in their respective states on the day appointed by the Continental Congress, and discharged their functions according to the method prescribed by the constitution. * * * The new constitution provided that the senators should be chosen by the State legislatures, but this provision was not free from ambiguity. Did the

governors constitute a part of the legislatures, and was their assent necessary to the choice? This question, if raised at all, which hardly appears, was settled at once against the governor's right. Indeed, at that moment it was of little consequence, except in Massachusetts, that being the only state in which the governor was allowed as yet any veto power on the passage of legislative acts. Supposing the choice to be vested in the state assemblies independently of the governor, should it be made by concurrent vote, that is, by each house acting separately, and having a negative on the other, or by joint ballot of both houses meeting together and voting as one body, the general practice where the election of state officers was vested in the assemblies? This question, which had prevented at first any choice in New York, was decided differently in different states, and both methods, that by joint ballot, and that by concurrent vote, have continued to prevail to the present day."

The next presidential election occurred in 1792. And I quote from the same volume, at page 382: "Washington again received the unanimous vote of the electors, the number being increased under the new apportionment and by the admission of new States to 130. Of the votes for the second candidate Adams received seventy-seven and Clinton fifty. All the votes of the New England states, including Rhode Island and Vermont, which had not voted at the former election, and the entire vote of Connecticut, which had then been divided, were given to Adams; instead of one vote

in New Jersey, and eight out of ten given to him in Pennsylvania at the first election, he now obtained the entire support of the two states, except one vote in Pennsylvania given to Clinton. He received also for the first time the entire vote of Delaware and Maryland, with six out of seven votes of South Carolina; but the five Virginia votes given to him at the first election were now withheld. Clinton received the entire vote of New York, Virginia, North Carolina and Georgia. Kentucky electors voted for Jefferson as their second candidate; one of the South Carolina votes was given to Burr."

Tennessee was admitted into the Union in 1796, in time for the appointment of her presidential electors. On the eighth day of August, 1796, "An act was passed providing for the election of three electors of President and Vice President. At the previous session four electors had been elected by joint ballot of the two houses. The mode electing in this instance is still more anomalous, the state is divided into three—Washington, Hamilton and Mero districts—and, in the words of the act, 'That the said electors may be elected with as little trouble to the citizens as possible—Be it enacted that John Carter, John Adams, and John McAllister of Washington, John Scott, Richard Gammon and James Gaines of Sullivan county, and three others for each of the remaining counties of Washington district and in like manner three others for each of the counties in Hamilton and Mero districts, 'are appointed electors to elect an elector

for the respective districts.' The electors named in the act were to meet at Jonesboro, Knoxville and Nashville, and elect an elector for each district. The three electors thus elected were to convene on the first Wednesday of December at Knoxville and 'proceed to elect a President and Vice President of the United States pursuant to an act of Congress.'" Annals of Tennessee, by Ramsey, p. 674.

I quote further from Hildreth's History U. S., p. 689, with reference to the election of 1796: "The choice of Presidential electors was very warmly contested in all the doubtful States. Governor Samuel Adams, brought forward as a candidate in the Boston district, was beaten. Gerry was chosen by the legislature for one of the districts in which the choice by the people had failed. He voted, however, for Adams and Pinckney, for which he apologized in a letter to Jefferson, on the ground that to have voted for him would have endangered Adams' election for President, to which Gerry thought him entitled, though desirous to see Jefferson chosen Vice President. After making the choice for electors in those districts in which the choice by the people had failed, the Massachusetts legislature, by joint resolution, authorized the electoral college to fill any vacancies that might occur in their own body. Governor Adams signed the resolution, but the next day he entered the secretary's office he erased his name, and sent a message to the legislature giving his reasons against it. The real reason undoubtedly was that, though not stated in the message, that any unfilled vacancy in the Massachu-

setts college would be so much taken from the Federal strength, and might, in a close division of votes, be decisive of the election. The legislature, however, expressed their opinion that the Governor was too late in his objections, and that his undertaking to alter a record by erasing his name was a proceeding altogether unauthorized. All the States north of Pennsylvania chose Federalists as electors; the choice in Connecticut and New York was by the legislature. The law of Pennsylvania provided for a choice by a general ticket, and the result in that State was thought likely to decide the choice of President! The friends of Jefferson were very anxious for a choice by districts, which would have divided the votes, but the Federalists, confident in their strength, had refused. Great, therefore, was their chagrin to find that the heavy vote of the trans-Allegheney district and the unexpected majority of two thousand for the opposition in the city and county of Philadelphia, had carried the State against them by a very close vote, only one of the Federal candidates being chosen. It was said that many Quakers voted the opposition ticket, through fear of a rupture with France. The law required the returns to be made within fourteen days, when the governor was to proclaim the result and notify those elected.

Had this law been literally applied the Federal ticket, notwithstanding an actual majority against it, must have been declared chosen. The returns from several heavy opposition counties being, by accident or design, behind time. Mifflin, however,

again chosen governor at this same election without opposition, chose to interpret the limit of fourteen days as only a direction to the returning officers, and to delay his own action until all the returns were actually in. He argued, and justly, taking the opposite doctrine to that under which Clinton had held for four years the government of New York—that voters ought not to be deprived of their rights on any merely formal and technical grounds. Delaware, and six of the ten Maryland districts were carried for the Federalists, one of them by a majority of four votes only. In Virginia, North Carolina, Georgia, Kentucky and Tennessee the Republican ticket prevailed, almost without opposition. The event at last seemed to depend upon South Carolina. The electors of that state, chosen by the legislature, were thought likely, as they actually did, to vote for Jefferson and Pinckney, thus taking one candidate from either party, a circumstance which might possibly make Pinckney President."

The next election occurred in 1800, and I quote from the second volume of Hildredth's History of the United States, second series, p. 389: "Meanwhile in America, the grand struggle destined to decide for years to come the policy and conduct of the Federal government was fast approaching its crisis. Three, or rather four, different modes of choosing electors for President and Vice President had hitherto been in use; a choice by the legislature, either by joint ballot or by concurrent vote; an election by the people by a general ticket, the whole number of electors being voted for on

one ballot, throughout the state; or a choice by the districts. The latter method was evidently that which gave the fairest expression to public opinion, by approaching nearest to a direct vote, but those states which adopted it were placed at the disadvantage of being exposed to a division of their strength and neutralization of their vote, while the electors chosen by either of the other methods voted in a body on one side or the other, thus making the choice of the state decisively felt. This consideration had induced the two leading states of Massachusetts and Virginia to abandon the district system. In Virginia where, the party in opposition to the Federal government was overwhelmingly predominant, the choice had been given to the people by general ticket, which in Massachusetts, where parties were more equally divided, it had been retained by the legislature. In Maryland the Federalists controlled the state senate, and had they succeeded in carrying the house they would have also adopted a choice by the legislature, but in the election of members for the house, which had just taken place, the opposition obtained a majority, and the choice by districts remained as before. Similar causes produced a similar result in North Carolina; in Pennsylvania also the opposition succeeded in electing a majority to the lower house of the assembly, but the Federalists still retained their majority in the senate, and when McKean called the assembly together for the choice of electors, it was not so easy to arrange how it should be done. The republicans were eager for the choice by a joint

ballot which would give them the whole, but to this the senate would not consent, except on terms such as would secure to the Federalists a share of the electors. They proposed that eight out of fifteen might be nominees of the house and the other seven to be nominated by the senate. This offer, made in various shapes, was several times peremptorily refused, but as in a very close division of parties, one vote might determine the election, it was agreed to at the last moment and the bill was passed by the provisions of which each house was to nominate eight candidates, from whom by joint ballot the fifteen electors were to be chosen. Pennsylvania, of course, stood eight opposition to seven Federal electors. A similar neutralization of political forces had taken place in the other states where the district system was maintained. Maryland was equally divided; North Carolina elected eight opposition electors to four Federalists. The Federal ticket prevailed entire in the four New England states, also in New Jersey and Delaware. Opposition electors were chosen in New York and in all the states south of the Potomac, the four Federalists in North Carolina excepted. In South Carolina, where the choice was by the legislature, in which were many members of doubtful politics, the result was regarded as very uncertain. The opposition offered to compromise on Jefferson and Pinckney, but after consideration the Federalists resolved to stand by their own ticket, which was lost, however, by from fifteen to eighteen votes in a

house of one hundred and fifty-one members. This gave a majority of eight opposition electors in the colleges, but even after this was known the event still hung in suspense. It was not certain that the electors on either side would strictly conform to the party nominations, for the original intention of the constitution was still so far respected that public opinion as yet conceded to the electors a certain private liberty of choice."

In 1808, it is stated by Mr. Hildredth, Vol. III, History of U. S., page 94, that "Federal electors were also chosen by the legislatures of Connecticut and Massachusetts, in which latter state there was a Federal Congressional gain of five members. Delaware was still every way Federal. In Maryland and North Carolina where the choice of electors by districts was yet persevered in, five Federalists were chosen, making in all forty-seven Federal electors, a much larger number than had been counted on when the canvass commenced. Those of New York, chosen by the legislature by a compromise between the Clintonians and the Lewisites were distributed six to Clinton and the remaining thirteen to Madison, who thus received one hundred and twenty-two of the one hundred and seventy-six electoral votes. For the Vice Presidency Clinton received one hundred and thirteen votes, Vermont and Ohio voting for Langdon, while the six New York votes given to Clinton for President deprived him of as many Vice Presidential votes, divided between Madison and Monroe.

The next Presidential election, which occurred in 1812, we quote fromthe same authority, at Page 376: "Under the adroit management of Martin Van Buren, who as a member of the senate of New York now first appeared on the political stage, the Clintonians in spite of the underhanded opposition of Governor Tompkins succeeded by the aid of their Federal allies in choosing their ticket for electors. A similar result occurred in New Jersey, and all the New England states except Vermont, where the legislature to make sure in a very close division of parties, assumed the choice of electors to themselves. The addition of five out of eleven Maryland votes raised the number for Clinton to eighty-nine. The states south and west of the Potomac, including Ohio, voted in a body for Madison, and gave him an equal number. Vermont, Pennsylvania and the six democratic districts of Maryland, raised Madison's vote to one hundred and twenty-eight."

We quote further from the same author, on page 620, respecting the Presidential election of 1816: "By the original intention of the framers of the Federal constitution a very responsible and important part was to have been played by the electors of President. In practice they had sunk into ciphers; their office had been usurped by congressional party caucuses; and Monroe's nomination by such a caucus had been equivalent to an election. He had in fact received the votes of all the states except Massachusetts, Connecticut and Delaware, which gave to

Rufus King thirty-four votes. Three Federal electors chosen in Maryland and one in Delaware did not vote at all. Monroe received one hundred and and eighty-three electoral votes. and Tompkins as Vice President the same number.

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The Supreme Court of the United States,

OCTOBER TERM, 1892.

Term No. 1170.

WILLIAM McPHERSON *et al.*,
Plaintiffs in Error,
vs.
ROBERT R. BLACKER, Secretary of State of the State of Michigan,
Defendant in Error.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

Brief of Otto Kirchner for Defendant in Error.

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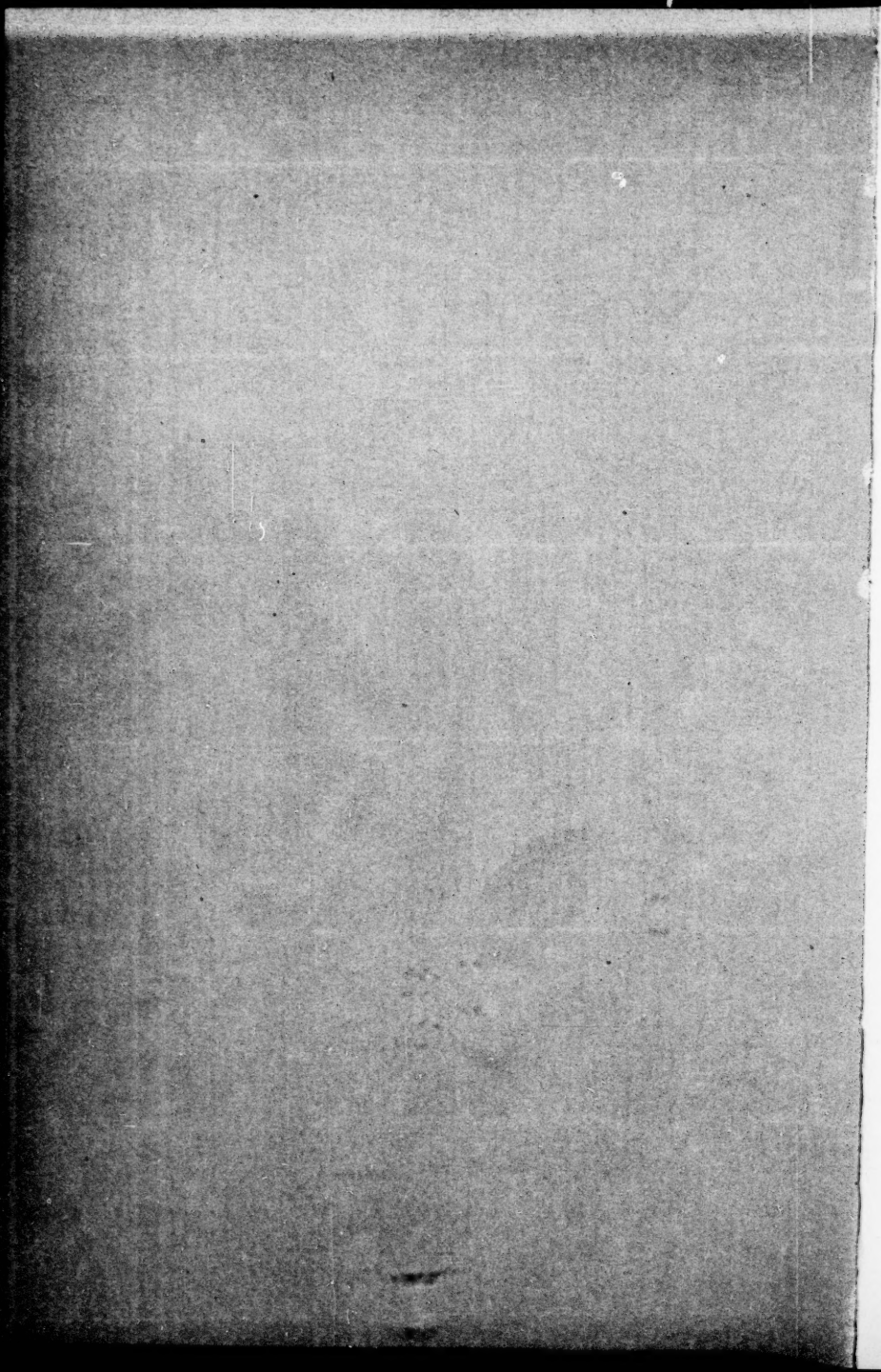

Supreme Court of the United States.

THE PEOPLE, on the relation of WILLIAM MCPHERSON, JR., and others, *Plaintiffs in Error,* vs. ROBERT R. BLACKER, Secretary of State of the State of Michigan, *Defendant in Error.*	*Error to the Supreme Court of the State of Michigan.*

Brief of Otto Kirchner, of Counsel for Defendant in Error.

STATEMENT OF THE CASE.

The object of this proceeding is to review the ruling of the Supreme Court of the State of Michigan declining to award a writ of *Mandamus* to the relators, plaintiffs in error, to the Secretary of State, the defendant in error, directing him to cause to be delivered to the sheriff of each county in the State, between the first day of July, 1892, and the first day of September, 1892, "a notice in writing that at the next general election to be held in the State of

Michigan, on the eighth day of November next, there will be chosen, among other officers to be named in said notice, as many Electors of President and Vice-President of the United States as the State of Michigan may be entitled to elect of Senators and Representatives in Congress."

The relators are the candidates of the Republican party of the State of Michigan for the office of Electors of President and Vice-President of the United States at the ensuing general election.

The duty of the Secretary of State in the premises is defined by § 147 of Howell's Statutes, as follows, to wit:

"The Secretary of State shall, between the first day of July and the first day of September preceding a general election, direct and cause to be delivered to the sheriff of each county in this State a notice in writing that at the next general election there will be chosen as many of the following officers as are to be elected at such general election, viz: A Governor, Lieutenant-Governor, Superintendent of Public Instruction, Commissioner of the State Land Office, members of the State Board of Education, Electors of President and Vice-President of the United States and a Representative in Congress for the district to which each of such counties shall belong."

The Court below, on relator's petition, in accordance with the established practice, issued an order directing the Secretary of State to show cause why a *Mandamus*, as prayed for, should not be issued.

In response to this petition and the order to show cause issued thereon, the respondent, Secretary of

State, filed an answer in which (conclusion of 5th paragraph, Record, p. 17) he explicitly and in terms denied that he refused to give the notice required by the statute above quoted.

At the session of the Legislature held in 1891, an act to provide for the election of Electors of President and Vice-President of the United States, and to repeal all other acts and part of acts in conflict therewith, approved May 1, 1891, was passed. (See Public Acts of Michigan, session of 1891, pp. 50 and 51.)

The Act is printed *in extenso* as an appendix to the brief of Mr. Duffield, one of the counsel for plaintiffs in error. It is, therefore, unnecessary to repeat it here.

In general terms it provides for the election of an elector and of an alternate elector in each of the twelve congressional districts of the State; for one elector and one alternate elector at large by the electors living easterly of a line defined by the Act; and also for the election of an elector and an alternate elector by the electors living westerly of that line.

The Act is known in Michigan as the Miner Law; from the fact that it was framed and introduced in the Legislature by Hon. John Miner, of the Detroit bar, who was a member of the Lower House. It will be referred to by that name throughout this brief.

The respondent, Secretary of State, in view of the provisions of the Miner Law, has declared in his answer that it is his intention to state in the statutory

notice that there will be elected one presidential elector at large and one district presidential elector and two alternate presidential electors, one for elector at large, and one for the district presidential elector in each voting precinct. (6th paragraph of answer, Record, p. 17.)

The relators (plaintiffs in error) claim that the notice required to be given under § 147, Howell's Statutes, is affected by the Miner Law, if valid, and that the Miner Law is invalid, because they say:

(*a*) It conflicts with § 2, Article II, of the Federal Constitution.

(*b*) It conflicts with the XIV Amendment of the Federal Constitution.

(*c*) It conflicts in some of its provisions with the Act of Congress approved February, 1887. (24 U. S. Stats. at Large, p. 373; Supp. R. S., Vol. 1, pp. 525 *et seq.*)

We contend:

I.

THAT THE DECISION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, REFUSING THE MANDAMUS PRAYED FOR, IS NOT REVIEWABLE BY THIS COURT, BECAUSE:

(*a*) *The case does not fall within the 25th section of the Judiciary Act.* (Revised Statutes U. S., § 709.)

Under it this Court may review the final judgment or decree in any suit by the highest Court of a State in the following cases only:

(1) Where is drawn in question the validity of a

statute of or an authority exercised under the United States, and the decision is against its validity, or

(2) Where is drawn in question the validity of a statute of or authority exercised under any State on the ground of their being repugnant to the Constitution treaties or laws of the United States, and the decision is in favor of their validity, or

(3) Where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held, or authority exercised under the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission or authority.

It is well settled that this Court has no jurisdiction to review the judgment of the State Court, except under the 25th section of the Judiciary Act above referred to.

Ryan vs. Thomas, 4 Wall., 603.
Caperton vs. Ballard, 14 Wall., 238.
Hurly vs. Treat, 8 Ibid, 85.
Simmerman vs. Nebraska, 116 U. S., p. 54.

The statute requiring the Secretary of State to give the notice does not require him to state how many of the officers are required to be elected at the then next general election.

The words contained in § 147 Howell's Statutes, to wit: "As many of the following officers as are to be elected," are used, because all the officers mentioned in the statute are not voted for at each general election.

They do not mean that the notice shall specify how many of the different officers enumerated shall be elected.

§ 137 of Howell's Statutes provides for a general election in the State on the Tuesday succeeding the first day of November in the year 1852, and on the Tuesday succeeding the first Monday of November every second year thereafter.

The Electors of President and Vice-President of the United States, though not elected every second year, are named in the statute requiring the Secretary of State to give the notice, together with other officers who are elected biennially. (See State Constitution, Art. 8, §§ 1 and 2.)

If it were not for the language above quoted, to wit, "As many of the officers as are to be elected at such general election," the statute would in terms require a notice of the election of officers at each general election, some of which are voted for only at every alternate general election.

It is apparent, therefore, that the letter and spirit of the statute are fully satisfied when the Secretary of the State gives notice that the State officers named and Presidential electors are to be voted for at the next general election, without specifying how many officers of each kind, or how many Presidential electors shall be chosen; but however that may be, inasmuch as the number of electors to which the State is entitled and which are to be voted for at the next general election is not attempted to be increased or diminished by the Miner law, it is not apparent to me

how the provisions of the Miner law can in any way affect either the form or contents of the notice to be given under the statute above quoted.

The declaration of the Secretary of State, in his answer, as to the notice it is his intention to give does not alter the case. Such declaration forms no part of the issue tendered by the petition for the *Mandamus*. *Non constat* the Secretary of State may (speaking now as of the time the issue in the case was framed) not carry out such intention, and simply give notice among other things that fourteen Presidential electors are to be chosen at the next general election. That would be a true statement of the case whether the election proceeded under the Miner law, or by general ticket in accordance with the law as it stood prior to the passage of the Miner law.

The validity of the Miner law is in no way involved in the application for the Mandamus. There is nothing inconsistent between it and the statute under which the respondent, Secretary of State, is required to act.

It cannot, therefore, be claimed that the validity of a statute of the State of Michigan on the ground of its being repugnant to the Constitution, treaty, or laws of the United States, is drawn in question in the *Mandamus* proceeding.

The case, therefore, is not within the second subdivision of § 25 of the Judiciary Act.

Neither can it be claimed that any right, privilege or immunity is claimed under the Constitution, or any treaty, or statute of, or commission held, or authority

exercised under the United States, and that the decision of the Supreme Court of Michigan was against any such title, right, privilege or immunity.

The case, therefore, is not within the last clause of § 25 of the Judiciary Act.

I cannot conceive of it being contended it is under the first subdivision of the section.

The duty of the Secretary of State to give the statutory notice of the election was a public duty.

But conceding, for the sake of argument, that a candidate for office at the next general election has a right under the statute to insist that notice of the election shall be given, and to enforce such right by *Mandamus;* the right, if any, rests entirely upon the statute of the State of Michigan and is in no way affected by the Constitution, or treaty, or statute, or commission held, or authority exercised under the United States.

I submit, therefore, that the relators' case is not within the 25th section of the Judiciary Act and that the writ of error should be dismissed.

(*b*) It is true the Supreme Court of Michigan in passing upon the relators' right to the *Mandamus* prayed for decided (*McPherson vs. Blacker*, 52 N. W. Reporter, p. 469) that the Miner law did not conflict with any provision of the Federal Constitution, and that it was void only so far as it conflicted with the Act of Congress.

The expression by the State Court of an opinion

upon a Federal question does not give this Court jurisdiction of the case unless it appears that it was *necessary* to pass upon the Federal question in order to decide the case; and if a decision might have been reached by the State Court without passing upon the Federal question this Court will not take cognizance of the cause.

In *R. R. Co. vs. Rock*, 4 Wall., 177, the complainant filed a bill praying that certain bonds purporting to be the bonds of the County of Iowa should be declared void, and that plaintiff below should be enjoined from levying or collecting any tax to pay said bonds or interest on them.

The Court below decreed, as prayed by Rock; and the R. R. Co. appealed to the Supreme Court of Iowa, which affirmed that decree.

Afterward the Chief Justice of the Supreme Court of Iowa certified that upon the hearing of that cause there was drawn in question:

1. The validity of the constitution of the State of Iowa as being repugnant to the Constitution of the United States.

2. That clause of the Constitution of the United States which provides that no State shall pass any law impairing the obligation of contracts.

3. That clause of the Constitution of the United States which provides that said Constitution shall be the supreme law of the land.

And it was further certified that the decision was against the right claimed under the Constitution of the United States and the several clauses thereof.

On an appeal to this Court, a motion was made to

dismiss upon the ground that it nowhere appeared by the record that the question of the repugnancy of the laws and Constitution of Iowa to the Constitution and laws of the United States was passed upon ; and that the certificate of the judge would not of itself conclude the Court on that matter.

In disposing of the motion to dismiss, Mr. Justice Miller, speaking for the Court, said (p. 180):

" After a very full examination of the record of the case, we are unable to discover that either the validity of the Constitution of the State of Iowa, or the clauses of the Constitution of the United States mentioned in the certificate are involved in that record, or were decided by the Court. It is probable that counsel, in the argument of the case in the Supreme Court of Iowa, insisted that these matters were involved, and that the Chief Justice felt bound to certify when requested that they were drawn in question. But if the record does not show that they were *necessarily* drawn in question, this Court cannot take jurisdiction to reverse the decision of the highest Court of the State upon the ground that counsel brought them in question and argument.

The learned justice, quoting with approval from the decision of this Court in *Lawler vs. Walker*, 14 How., p. 149, among other things, said :

" The conflict of the State law with the Constitution of the United States and a decision of the State Court in favor of its validity must appear upon the face of the record before it can be re-examined in this Court ; it must appear in the pleadings of the suit or from the evidence in the course of the trial, in the instructions

asked for, or exceptions taken to the ruling of the Court. *It must be that such a question was necessarily involved in the decision, and that the State Court would not have given judgment without deciding it.*

In *De Saussure vs. Gaillard*, 127 U. S., the controversy arose over bonds issued by the State of South Carolina. The litigation resulted adversely to the complainant, in the Supreme Court of the State of South Carolina. On error to this Court Mr. Justice Matthews, speaking for the entire bench (p. 332), said:

"It thus appears that in point of fact the Supreme Court of the State of South Carolina, in its opinion in this case passed upon the Federal question, sought to be raised by the plaintiff as the foundation of his case, and decided it adversely to him; *but the analysis of the case which we have made shows clearly that the decision of that question was not necessary to the judgment.*

The learned justice, after citing the numerous decisions of this Court upon the question, further (p. 234) said:

"And it has been repeatedly decided under § 709 of the Revised Statutes that to give this Court jurisdiction of a writ of error to a State Court it must appear affirmatively, not only that a Federal question was presented for a decision to the highest court of the State having jurisdiction, but that this decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it."

This Court dismissed the writ of error, and, as a reason for doing so (*id.*, *ibid.*), said:

"Inasmuch, therefore, as the judgment of the Supreme Court of the State of South Carolina, sought to be brought in review by this writ of error, does not involve any question *necessarily* arising under the Constitution of the United States, or the laws and treaties made in pursuance thereof, we must refuse to take jurisdiction in the case."

If, therefore, we are right in our intention that the Miner law has no bearing upon § 147 of Howell's Statutes, it, of course, follows that a decision as to whether the Miner law was in conflict with the laws or Constitution of the United States is not necessary to a decision of the case.

There are other grounds upon which the decision of the Court refusing the *Mandamus* might have been placed without touching any Federal question.

In the first place a *Mandamus* is not a writ of right in Michigan even when it is asked against a public officer to compel him to discharge a public duty.

In all cases it is granted or refused in the sound discretion of the Court.

People vs. Regents, 4 Mich., p. 98.
Mabley vs. Superior Court Judge, 41 Mich., 479.
Haley vs. Risley, 69 Mich., p. 596.

I shall endeavor to show in a subsequent part of this brief that whether the Miner law is valid, is a political, not a legal question; that all controversies growing out of it must be determined by the Executive of the State and by the State Board of Canvas-

sers, whose action is not reviewable by any judicial tribunal, and finally by the two Houses of Congress under Act approved February 3, 1887. (24 U. S. Stats. at Large, p. 373.)

Even if this Court should not agree with me in that contention, it might properly say, that in view of the possible conflict between the judiciary and the political departments of the Government that might grow out of diverse decisions, the *Mandamus* ought, in the exercise of sound, legal discretion, be denied.

It is apparent, therefore, that it was not necessary for the Supreme Court of the State to determine any Federal question in disposing of the case. The fact that the Court did not pass upon a Federal question not necessary to a decision of the case, does not, as I have shown, give this Court jurisdiction.

(*b*) *The subject matter of this controversy is not of judicial cognizance.*

Judicial power is in its nature, necessarily exclusive. It does not trench upon the domain of any other department of the government. It will not allow any other department of the government to trench upon its domain.

A matter is of judicial cognizance when the Courts have power to dispose of it *finally*.

The late Mr. Justice Miller in his lectures on the Constitution (p. 314), said :

"It (the judicial power) is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision."

In the early history of the country an Act of Congress, passed February 28, 1793 (1 U. S. Stats. at Large, 325) in terms imposed upon the Federal judges the duty of settling the claims of widows and orphans and claims to invalid pensions. The judges refused to execute the act of Congress in their judicial capacity.

The Circuit Court for the District of New York, consisting of Mr. Chief Justice Jay, Mr. Justice Cushing, and Mr. District Judge Duane, assigned the following reasons among others for their refusal:

"That neither the legislative nor executive branches can consistently assign to the judicial any duties but such as are properly judicial and to be performed in a judicial manner.

"That the duties assigned to the Circuit Courts by this Act are not of that description, and that the act itself does not appear to contemplate them as such, *inasmuch as it subjects the decisions of these Courts made pursuant to those duties first to the consideration and suspension of the Secretary at War, and then to the revision of the Legislature; whereas by the Constitution neither the Secretary at War nor any other executive officer, nor even the Legislature, are authorized to sit as a Court of Errors upon the judicial acts or opinions of this Court.*"

The Circuit Court for the District of Pennsylvania among other things said:

"Upon due consideration we have been unanimously of opinion that under this Act the Circuit Court held for the Pennsylvania District could not proceed:

"1. Because the business directed by this Act is not

of a judicial nature; it forms no part of the power vested by the Constitution in the Courts of the United States, the Circuit Court must have proceeded without constitutional authority.

"2. Because if upon that business the Court had rendered its judgments, for its opinions are its judgments, *it might under the same Act have been revised and controlled by the Legislature and by an officer in the executive department. Such revision we deemed radically inconsistent with the independence of that judicial power which is vested in the Courts, and consequently with that important principle which is so strictly observed by the Constitution of the United States.*"

The judges of the Circuit Court of the United States for the District of North Carolina assigned the following, among other reasons, for refusing to carry out the Act of Congress :

"That whatever doubts may be suggested whether the power in question is properly of a judicial nature, *yet inasmuch as the decision of the Court is not made final, but may be at least suspended in its operation by the Secretary at War if he shall have cause to suspect imposition or mistake*, this subjects the decision of the courts to a mode of revision which we consider to be unwarranted by the Constitution ; * * * * and we beg leave to add with all due deference that *no decision of any court of the United States can under any circumstances, in our opinion, agreeable to the Constitution, be liable to a reversion or even suspension by the Legislature itself, in whom no judicial power of any kind appears to be* vested, but the

important one relative to impeachments. (See note to Hayburn's case, Vol. I. Curtis' Decisions, p. 9 *et seq.*)

In Hayburn's case, 2 Dallas, 408, the validity of the Act of Congress was before this Court. After argument this Court held the case under advisement until the following term. In the meantime the Act was repealed and no decision was rendered.

Curtis, in his decisions (Vol. 19, p. 380 *et seq.*), publishes a note by Chief Justice Taney upon the decisions touching the validity of the Act of Congress.

The Chief Justice summarized the result of the opinions expressed by the judges as follows:

"1. That the power proposed to be conferred on the Circuit Courts of the United States by the Act of 1792 was not judicial power within the meaning of the Constitution, and was, therefore, unconstitutional and could not lawfully be exercised by the courts.

"2. That as the Act of Congress intended to confer the power of the Court as a judicial function, it could not be construed as an authority to the judges composing the Court to exercise the power out of Court in the character of commissioners.

"3. That money paid under a certificate from persons not authorized by law to give it might be recovered back by the United States.

In *The United States vs. Ferreira*, 13 How., 40, it was held that the Act of Congress authorizing the District Judge of the United States for Florida to adjudicate on claims suffered by inhabitants of Florida by

the operations of the American army in Florida, which claims were to be paid if the Secretary of the Treasury should, on a report of the evidence, deem it equitable, was held not to be an authority to exercise any of the judicial power of the United States under the Constitution, and that, therefore, no appeal lay to this Court from the action of the District judge.

The Court gave (*Ibid*, p. 46) the following reason, among others, for its conclusion:

"The proceeding is altogether *ex parte*, and all that the judge is required to do is to receive the claim when the party presents it, and to decide it upon such evidence as he may have before him, or be able himself to obtain. But neither the evidence nor his award are to be filed in the Court in which he presides nor recorded there, but he is required to transmit both the decision and evidence upon which he decided to the Secretary of the Treasury, and the claim is to be paid if the Secretary thinks it just and suitable, but not otherwise. It is to be a debt from the United States upon the decision of the Secretary and not upon that of the judge.

It is too evident for argument on the subject that such a tribunal is not a judicial one.

* * * * * * * * * * *

The decision is not the judgment of the Court of Justice. It is the award of a commissioner."

In re Cooper, 143 U. S., p. 342, on an application for a writ of prohibition to the District Court of the United States for the District of Alaska to restrain the enforcement of a sentence of forfeiture against a schooner upon the ground that the act charged as a ground of forfeiture, was not done within the territorial

jurisdiction of the Court, this Court held that while placing its decision upon other grounds it might rest it upon the ground that the question of territorial jurisdiction would not be determined by it *inasmuch as the question was then pending between the United States and a foreign power, and was then the subject of diplomatic negotiation between the powers.*

This Court, among other things (*Id., Ibid*, bottom p. 503 and following), said:

"But we need not go farther in this direction, as our decision rests upon narrower grounds, and we have been led into these observations, because, where an application has been made to stay the enforcement of a decree many years after its rendition, and after the pendency of an appeal therefrom for the same length of time, an appeal being allowable as we shall presently see, we do not regard the Court as constrained to intervene in this way unless, perhaps, upon an irresistible case and adequate reason shown for the delay, *and particularly not where such intervention involves the definition of a line of demarcation between co-ordinate departments of the Government and the determination of public questions, action in reference to which is appropriately confided to other departments than the judiciary.*"

Applying the principles of these decisions to the case at bar, I say this controversy is not judicial, because whatever decision this Court, or any other court, may make as to the validity of the Miner law, is subject to review by the political officers and agencies to which I shall presently refer.

§ 2 of the Miner law reads as follows:

"The counting, canvassing and certifying of the votes cast for said electors at large and their alternates, and said district electors and their alternates, shall be done as near as may be in the same manner as is now provided by law for the election of Electors of President and Vice-President of the United States."

The provision of law referred to in the section is found in Howell's Statutes, § 211, and is as follows:

"For the purpose of canvassing and ascertaining the votes given for Electors of President and Vice-President of the United States, the board of canvassers shall meet on the Wednesday next after the third Monday of November, or on such other day before that time as the Secretary of State shall appoint, and the powers, duties and proceedings of said board, and of the Secretary of State in sending for, examining, ascertaining, determining, certifying and recording the votes and results of the election of such electors, shall be in all respects as near as may be as hereinbefore provided in relation to sending for, examining, ascertaining, determining, certifying and recording the votes and results of the election of State officers."

§§ 4 and 5 of Art. 8 of the Constitution of the State of Michigan, are as follows:

"Sec. 4. The Secretary of State, State Treasurer and Commissioner of the State Land Office shall constitute a Board of State Auditors to examine and adjust all claims against the State not otherwise provided for by the general law. *They shall constitute a Board of State Canvassers to determine the result of all elec-*

tions for Governor, Lieutenant Governor and State officers, and of such other officers as shall by law be referred to them."

"Sec. 5. In case two or more persons have an equal and the highest number of votes for any office as canvassed by the Board of State Canvassers, the Legislature in Joint Convention shall choose one of said persons to fill such office. *When the determination of the Board of State Canvassers is contested, the Legislature in Joint Convention shall decide which person is elected.*"

In *Royce vs. Goodwin*, 22 Mich., p. 496, it was attempted by *quo warranto* proceedings to try the right of Goodwin, who had received the majority of the votes cast at the election, for the office of Circuit Judge, to hold the office; Royce contending that Goodwin was disqualified by reason of his non-residence in the judicial district for which he was elected.

The Supreme Court of Michigan held that inasmuch as the Board of State Canvassers had awarded the certificate of election to Goodwin, its decision was not reviewable by a court of justice, not even as to the constitutional qualification of the respondent to hold the office.

In *Sutherland vs. The Governor*, 29 Mich., p. 330, the Supreme Court of Michigan refused to entertain an application against the Governor of the State to compel him to issue a certificate, in accordance with the fact, that the Portage Lake and Lake Superior Ship Canal and Harbor had been constructed in conformity with the Act of Congress making a land grant for the

same, and the acts of the Legislature of Michigan conferring the grant upon a corporation represented by the relators, although the Governor speaking through the Attorney General declared his willingness to submit to the judgment of the Court.

Among other things the Court (p. 330) said:

"It is not consistent with the dignity of the Courts to pronounce judgments *which may be disregarded with impunity;* nor with that of the Executive to place him in a position where, in a matter within his own province, he must act contrary to his judgment or stand convicted of a disregard of laws.

The Act of the Congress approved February 3, 1887, to which reference has already been made, contains the following provisions:

§ 1 "That the electors shall meet and give their votes on the second Monday in January next following their appointment, at such place in the State as the Legislature in such State shall direct."

§ 2 provides:

> "Each State may provide by *judicial or other methods or procedure* for the final determination of any controversy or contest concerning the appointment of all or any electors."
>
> This provision must be made:
>
> "By law enacted prior to the day fixed for the appointment of electors."
>
> The determination is conclusive:
>
> "If made at least six days prior to the time of the meeting of the electors."

§ 3:

It is "the duty of the Executive of each State as soon as practicable after the conclusion of the appointment of electors in such State by the final ascertainment under and in pursuance of the laws of such State, providing for such ascertainment," to send to the Secretary of State of the United States, "a certificate of such ascertainment of the electors appointed," setting forth:

The names of such electors.

"The canvass or other ascertainment under the laws of such State of the number of votes cast for each person for whose appointment any and all votes have been given or cast."

The Executive shall deliver to the electors:

"The same certificate in triplicate under the seal of the State."

The electors are required to transmit the certificate:

"In the same manner and at the same time as they are by law required to transmit the result of their action."

N. B.—That the certificate of the Executive under the seal of the State, above referred to, has no reference to the determination by judicial or other methods or

procedures for which provision is made by Section 2 of the Act, is manifest from the fifth subdivision of Section 3, viz:

"And if there shall have been any final determination in a State of a controversy or contest, as provided for in Section 2 of this Act, it shall be the duty of the Executive of such State to certify to the Secretary of State of the United States such determination in form and manner as the same shall have been made."

§ 5:

Provides for the counting of the electoral votes in joint convention of the Senate and House of Representatives.

Subdiv. 5:

Requires the President of the Joint Convention to call for objections.

Every objection must be in writing, and state clearly and concisely, and without arguments, the ground therefor.

Subdiv. 6:

Every objection is to be submitted to each House separately for its decision.

Subdiv. 7:

If there be only one return, it shall not be rejected when the electoral vote is given by the electors whose appointment has been lawfully certified, according to Section 3.

Provided, nevertheless:

"The two Houses may concurrently reject any vote or votes, when they agree that such vote or votes has not been regularly given by electors *whose appointment has been so certified.*"

Subdiv. 8:

If there be more than one return—

Only such votes shall be counted as "shall have been regularly given by the electors who are shown by the determination mentioned in Section 2 of this act to have been appointed, if the determination in said section provided for, shall have been made," or by the successors or substitute of such electors, etc.

Subdiv. 9:

If there be a question as to which two or more State authorities determining what electors have been appointed (as mentioned in Section 2) is the lawful tribunal of such State, then:

Only the vote of such electors, and such only, shall be counted, whose title as electors the two Houses shall concurrently decide is supported by the decision of such State so authorized by its laws.

Subdiv. 10:

If there has been no determination of the question in the State (as provided by § 2), then:

The Houses concurrently or separately shall determine the question.

If they cannot agree, then :

The votes of the electors named in the Governor's certificate shall be counted.

We find, then, that under the Act of Congress all questions arising out of or connected with, the election of Electors of President and Vice-President must be decided :

(*a*) By such judicial or other methods or procedures as each State may provide by law enacted prior to the day fixed for the appointment of electors pursuant to the Act of Congress.

No judicial or other methods or procedures have thus far been provided, by law, by the State of Michigan, in conformity with the Act of Congress.

If none are provided within the time limited by Congress, then :

(*b*) By the Board of State Canvassers (there being no other provision of law for ascertaining the votes cast for the electors), as certified by the Governor of the State to the Secretary of State of the United States.

Under the Michigan system, as already shown, the votes for Electors of President and Vice-President are canvassed by the Board of State Canvassers. Its decision, as we have shown, is not subject to judicial review.

We also find :

The Governor's certificate as to the result of the canvass or other determination is conclusive :

(*a*) When there is only one return from the State.

(*b*) When there are two or more returns and the two Houses of Congress cannot agree as to which shall be counted.

We further find the two Houses of Congress have power to determine conclusively:

(*a*) Whether in any case the votes cast for President and Vice-President have been so regularly given by the electors whose appointment has been so certified.

If they agree they have not been so given, the two Houses of Congress may reject the votes of the electors.

(*b*) When there are two or more returns from any State, the two Houses of Congress determine which of the two or more State authorities (constituted under § 2) that have decided what electors have been appointed, is the lawful tribunal of such State.

The legal status of the situation may be recapitulated thus:

1. The canvass and final determination as to who is elected to the office of elector rests with the Board of State Canvassers in the first instance.

This decision, as we have already shown, is not subject to review or control by any Court within the State of Michigan.

2. If the decision of the Board of Canvassers as to who is elected to the office of Presidential elector is contested, the final decision of the controversy rests in the next place with the Legislature of the State in Joint Convention.

It cannot be contended that the action of the Legislature is subject to judicial review or control.

3. It then rests with the Governor of the State, whose duty it is to certify the action of the State Board of Canvassers. He may have to decide between contending boards.

The action of the Governor, as we have already shown, is not subject to judicial review or control.

And, finally, the whole matter rests with both Houses of the Congress of the United States.

It is manifest, therefore, that whatever decision the Court may render in this case is not final, but subject to review by the political agencies already referred to.

It will not do to say that the *order* of the Court awarding a *Mandamus* is final. The decision of this Court *In Re Cooper* (cited *supra*), would also have been final as to the subject matter of the controversy.

The notice for which the *Mandamus* is prayed is of no consequence, and the giving of it, or the failure to give it, in no way affects the validity of the election.

People vs. Hartwell, 12 Mich., 508.
People vs. Witherell, 14 Mich., 48.
Attorney General vs. Canvassers of Iron County, 64 Mich., 607.

The object of this proceeding is not to determine whether the notice prayed for in the petition should be given, but to obtain a decision upon the validity of the Miner law.

That decision is, as we have shown, subject to review, and subject to be utterly disregarded by the political agencies already referred to.

Furthermore, what would be the position of this Court if after passing upon this question, an extra session of the Legislature were called, a tribunal

established in conformity with § 2 of the Act of Congress approved February 3, 1887, and the decision of that tribunal were in conflict with the decision of this Court?

Such a tribunal, it is clear, would have exclusive jurisdiction of this controversy, because if established it would be "for a final determination of *any controversy or contest* CONCERNING *the appointment of any or all electors.*"

And in the absence of such a special tribunal, the decision of the main question rests ultimately with the two Houses of Congress.

I submit that the Act of Congress of February 3, 1887, conclusively shows that *all* questions arising out of or connected with the election of a Presidential elector are in their nature political and not judicial, and therefore not within the cognizance of this Court. If the questions were judicial in their nature, it would not be competent for Congress to provide for their determination by "judicial or other methods or procedures."

The want of a tribunal competent to deal with questions of this kind was brought to the attention of Congress by the Senate Committee on Privileges and Electors (Senate Report 395, Forty-third Congress).

The committee had been instructed to report upon the best and most practicable mode of electing the President and Vice-President, and providing a tribunal to adjust and decide all contested questions connected therewith.

The committee, composed of the foremost lawyers of the country, among other things reported:

"It will thus be seen that the mode of choosing the electors is placed entirely beyond the power and jurisdiction of the national government; and whatever disorders, irregularities, or failures in the appointment of electors may occur in any of the States, they are entirely without remedy or redress upon the part of the government of the United States. All of the States now, by the enactment of the Legislatures, provide that the electors shall be chosen at large by the qualified voters of the State; *but in no State, we believe, is there a legal provision made for the settlement of a contest that may arise in regard to such election.*"

Finally, it is well established that before there can be any proper exercise of the judicial power, a case must be presented in court for its action. (Miller's Lectures on the Constitution, p. 314.)

If there ever was a case for judicial cognizance it has long since vanished.

The petition prays for a *Mandamus* directing the Secretary of State to give the notice between the first day of July and the first day of September of the present year.

Whatever statutory duty rests upon the Secretary of State in the premises must be performed within these dates. There is no authority in law to compel the Secretary to give the notice of election at any other time. If the Court should now decree a *Mandamus* in accordance with the prayer of the petition,

it would direct the Secretary of State to do that which is in its nature impossible of performance. This Court will not do so vain a thing.

III.

THIS COURT IS BOUND BY THE DECISION OF THE SUPREME COURT OF MICHIGAN AS TO ALL MATTERS SOUGHT TO BE RAISED BY THE PETITION, EXCEPT THE QUESTION AS TO WHETHER THE MINER LAW CONTRAVENES THE XIV AMENDMENT OF THE CONSTITUTION.

(*a*) The only conflict between the Miner law and the Act of Congress relates to the time of the meeting of the electors and the certification of their appointment.

Wherever the Miner law and the Act of Congress conflict, the latter of course controls. The Supreme Court of Michigan held that what remained of the Miner law was a valid expression of the legislative will within constitutional limitations.

The validity of so much of the Miner Act as does not conflict with the Act of Congress, barring the Federal question already referred to, is, I submit, a question of local law upon which the determination of the local tribunal is conclusive.

(*b*) It is contended by the relators (plaintiffs in error) that the appointment of Presidential electors by the people of the several Congressional districts

instead of by the people of the whole State is not an appointment by the State, and that the Miner law, therefore, contravenes the second article of the Constitution.

Broadly stated, the question, therefore, is whether an appointment of electors by a Congressional District in conformity with the Miner Act is an appointment by the State.

A State cannot act but by and through its political organs. Whether the expression or act of any political organ of the State is the expression or act of the State, must, in the nature of things, I confidently submit, be a question of local law.

The State acts through its political agencies. Whether any organ is competent to bind the State or to speak for it, involves the construction of the laws, and, in a broad sense, of the Constitution of the State.

It is no answer to this contention that the State acts in the exercise of a power given it by the Constitution The fact remains, the power belongs to the State ; and the State can execute it only in conformity with its own Constitution and laws The Federal Constitution concerns itself only in giving sanction to the result of State action. It does not reach beyond that to the action of the State that produced the result.

IV.

THE MINER LAW DOES NOT CONFLICT WITH THE SECOND ARTICLE OF THE FEDERAL CONSTITUTION.

The latter provides, that "each State shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the State may be entitled in the Congress."

The language of the Constitution admits of no doubt of its intention to leave the *manner of appointment* to the discretion of the Legislature of each State.

What is the State? The people as a whole do not constitute it, but the people as politically organized constitute the State. The action of the people is not State action unless such action finds expression in or through some political organ duly constituted and established.

The people of the State cannot, short of revolution, amend or abrogate the Constitution except in conformity with constitutional methods.

An act is the act of the State whenever it is done or performed by any political agency lawfully authorized to speak for the State.

The Governor of the State, acting within constitutional limits, represents the State, and his official act is the act of the State.

The judiciary, in the exercise of the judicial power vested in it, represents the State, and its judgment is the expression of the State.

When a Congressional district in conformity with the Miner Law appoints a Presidential elector it becomes a State agency for that purpose, and in making the appointment voices the will of the State.

Thus in Michigan it is provided (Const., Art. VI., § 13):

"In each of the counties organized for judicial purposes there shall be a Court of Probate. The judge of said Court *shall be elected by the electors of the county* in which he resides, and shall hold his office for four years, until his successor is elected and qualified. The jurisdiction, powers and duties of such Court shall be prescribed by law."

The Supreme Court of Michigan held (*Dowell vs. Manistee Supervisors*, 40 Mich., 588) that a Judge of Probate *elected by the electors of the county* under the constitutional provision above quoted is a State officer.

Among other things the Court (40 Mich., 588) said:

"It is very clear to see that the duties performed by Probate Judges are *in no sense services performed for their respective counties and that they are in no sense county officers.* They exercise a portion of the judicial and prerogative power of the State and cannot be subjected to the direction of any body inferior to the Legislature. It is very plain that if their salaries can be put under the complete control of any local body and be changed in its discretion, it will be an unlawful abdication of the power of the State which cannot be upheld on any principle. The Legislature is the only body having charge of the State interests, and cannot be subject to the local passions and preju-

dices which may, and often do, produce confusion in local affairs, and which, if allowed free action, may destroy the independence and break up the business of one of the most important branches of our judicial system."

The decisions of this Court have been in entire harmony with our contention.

In *New Orleans Water Works vs. Louisiana Sugar Co.*, 125 U. S., p.18, the question was whether an Ordinance of the city of New Orleans, passed in conformity with the charter powers granted to the city by the Legislature was a law of the State within the meaning of the Federal Constitution prohibiting a State from passing a law impairing the obligation of contracts. This Court held that it was.

At p. 31 (125 U. S.) this Court quoted with approval what was said by Mr. Justice Field in *Williams vs. Bruffy*, 96 U. S., 176, 183, as follows:

"Any enactment from whatever source originating to which a State gives the force of law is a *statute of the State* within the meaning of the clause cited relating to the jurisdiction of this Court."

In *Murray vs. Charleston*, 96 U. S., p. 440, where the question arose as to the validity of a tax imposed under an ordinance of the city of Charleston, this Court said:

"It was not until the ordinances were passed under the supposed authority of the Legislative Act *that their provisions became the law of the State.* It was only when the ordinances assessed the tax upon the

city debt and required a part of it to be withheld from the creditors that it became the law of the State that such a withholding could be made. The validity of the authority, given by the State as well as the validity of the ordinances themselves, was necessarily before the Court of Common Pleas when this case was tried, and no judgment could have been given for the defendants without determining that the ordinances of the State did not impair the obligation of the contracts made by the city with the plaintiff."

It seems to me that our contention that whatever act is done by authority of the State is the act of the State, is fully established by these decisions.

The argument upon this branch of the case might well end here.

The contention that the mode of electing Presidential Electors, pointed out by the Miner law, is unconstitutional, is a novel one in the judicial history of this country.

Mr. Justice Story (on the Constitution, § 1472) said:

"It is observable that the language of the Constitution is that each State shall appoint in such manner as the Legislature thereof shall direct the number of electors to which the State is entitled. Under this authority the appointment of electors has been variously provided for by the State Legislature. In some States the Legislators have directly chosen the electors by themselves. In others they have been chosen by the people by a general ticket throughout the whole State, and in others by the people in electoral districts fixed by the Legislature, a certain number of elect-

ors being apportioned to each district. *No question has ever arisen as to the constitutionality of either mode except that of a direct choice by the Legislature.* But this, though often doubted by able and ingenuous minds, *has been firmly established in practice ever since the adoption of the constitution, and does not now seem to admit of controversy* EVEN IF A SUITABLE TRIBUNAL EXISTED TO ADJUDICATE UPON IT. At present in nearly all the States the electors are chosen either by the people, or by a general ticket, or by the State Legislature. The choice in districts has been gradually abandoned and is now persevered in but by two States. The inequality of this mode of choice, unless it should become general throughout the Union, is so obvious that it is rather a matter of surprise that it should not long since have been wholly abandoned. In case of any party divisions in a State it may neutralize its whole vote, while all the other States give an unbroken electoral vote. *On this account, and for the sake of uniformity, it has been thought desirable by many statesmen to have the Constitution amended so as to provide for a uniform mode of choice by the people.*"

Von Holst (Constitutional Law of the U. S., p. 85) says:

"The Constitution provides that every State shall have as many electors as it has Senators and Representatives in Congress, *but leaves it wholly to the Legislatures to determine how they shall be chosen.* Although they are elected at present in all the States by the people, yet so far as the Federal Constitution is concerned *this is solely a matter of fact.* Every State

is still authorized to do as South Carolina did for a long time—have the electors appointed by the Legislature, *or they can be elected in any other manner whatsoever.*"

The Senate Committee on Privileges and Elections, in their report already referred to (Senate Report 395, Forty-third Congress), considered and exhaustively reported upon this question.

In their report they, among other things, said:

The Constitution provides that:

"Each State shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress.

"The appointment of these electors is thus *placed absolutely and wholly with the Legislatures of the several States. They may be chosen by the Legislature, or the Legislature may provide that they shall be elected by the people of the State at large, or in districts, as are members of Congress, which was the case formerly in many States;* AND IT IS NO DOUBT COMPETENT FOR THE LEGISLATURE TO AUTHORIZE THE GOVERNOR, OR THE SUPREME COURT OF THE STATE, OR ANY OTHER AGENT OF ITS WILL, TO APPOINT THESE ELECTORS.

"This power is conferred upon the Legislatures of the States by the Constitution of the United States, and cannot be taken from them or modified by their State constitutions any more than can their power to elect Senators of the United States. Whatever provisions may be made by statute or by the State Constitution

to choose electors by the people, there is no doubt of the right of the Legislature to resume the power at any time, for it can neither be taken away nor abdicated. In the early Presidential elections the electors were chosen in many States by the Legislatures; and as late as 1824, in Delaware, Georgia, South Carolina, Louisiana, New York and Vermont, they were chosen by the Legislatures, and South Carolina continued this practice up to the war of the rebellion.

"Therefore, under the Constitution as it now stands, it is in the power of any Legislature to repeal all laws providing for the election of electors by the people and take such election into their own hands. It may be said this is not likely to be done; but the answer is that it may be and that it has been done; and who can tell what may be the future exigencies of parties and politicians, or what they may not do? As has been already remarked, South Carolina chose electors by her State Legislatures up to the period of the rebellion, and at all Presidental elections prior to 1852 the electors were variously chosen—some by the legislatures in joint convention; others by the two houses, where they were divided in politics, acting separately and dividing the electors between them by contract. Other States chose electors by the general-ticket system; others again by the single-district system; and still others by the double or triple district system, that is, dividing the State into a smaller number of districts than there were members of Congress, and choosing two or three electors in one district. These heterogeneous methods, setting at defiance the popular will, long ago established the necessity for a uni-

form constitutional rule upon this subject, and nearly every eminent American statesman, within fifty years, has urged its adoption."

Appointment of Presidential electors by districts has been practiced from time to time by the following States: Maryland, New York, North Carolina, Virginia, Kentucky, Tennessee, Indiana, Illinois, Maine, and possibly others.

Presidential electors have been appointed by the Legislature in the following States: Connecticut, Delaware, Georgia, Massachusetts, New Jersey, Pennsylvania, Louisiana, Indiana, Alabama, Missouri and Florida; and by South Carolina down to 1864.

Down to and including the general election in 1824, Virginia appointed her Presidential electors by the Governor and council and assembly acting together.

There are but few States in the Union in which the method of appointment has been uniform throughout.

As stated by Story, no one ever questioned the validity of either mode of appointment, except the appointment by the Legislature. Yet no contest has ever arisen upon any such appointment, and no one, until in this present case, has invited the judiciary to meddle with what is manifestly a purely political question. At the time when Judge Story wrote, and down to the time when the Senate committee made its report to the Forty-third Congress, no tribunal existed that, in their opinion, was competent to deal with the question. Not until the passage of the Act of Congress approved February 3, 1887, was provision made for a competent tribunal.

The practice under other provisions of the Constitution has been in harmony with our contention. Thus it is provided (§ 2, Art. 1, Federal Const.):

"The House of Representatives shall be composed of members chosen every second year *by the people* of the several *States*.

* * * * * * * *

Representative and direct taxes shall be apportioned *among the several States*.

* * * * * * * *

The number of representatives shall not exceed one for every thirty thousand, but *each State* shall have at least one representative; and until such enumeration shall be made, the *State* of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, Georgia three.

When vacancies happen in the representation from *any State* the executive authority shall issue writs of election to fill such vacancies."

It is clear that the members composing the Lower House of Congress severally represent their respective *States*. A member is always spoken of as a representative of the *State*. A Congressional district, in terms, is entirely unknown to the Federal Constitution. It knows only *States* and *their* representatives. Nevertheless, the practice from the beginning has been nearly universal, and by Act of Congress is now com-

pulsory, for *each State* to apportion the representatives to which it is entitled in the Lower House of Congress among the several Congressional districts established by it,and the representatives thus elected by the several Congressional districts *severally represent their State.* If a representative chosen by a Congressional district in conformity with law does not represent the *State*, then, in the entire history of the country under the Constitution, no House of Representatives has ever been legally chosen.

One of the counsel for relators in the Court below, who has not yet honored me with a copy of his brief (to be presented to this Court), contended that whatever may have been the meaning or legal effect of the Constitution at the time of its adoption, and for some time afterward, inasmuch as the practice of electing Presidential electors by general ticket has since become uniform that, therefore, the meaning and legal effect of the Constitution has undergone a change in that, it has acquired a meaning in accordance with the prevailing practice under it that excludes the possibility of any other.

Such a contention is in direct conflict with every canon of constitutional construction that has ever been brought to my notice.

The capacity for constitutional growth and development, inherent in the constitution for which the counsel so strenuously contended, will not be denied by us ; but such growth and development is properly manifested only in the construction of the Constitution when

sought to be applied to subjects not thought of at the time it was framed. The possibility of constitutional growth and development upon other lines, or in other directions, is subversive of the Constitution itself. For myself, I cannot comprehend the mental process capable of begetting any such contention.

V.

THE MINER LAW DOES NOT CONFLICT WITH THE FOURTEENTH AMENDMENT OF THE CONSTITUTION.

It is fully settled that the right to vote is not one of the privileges or immunities of a citizen of the United States.

Miner vs. Happerrett, 21 Wall, p. 162.

See also— U. S. vs. Cruikshank, 92 U. S., p. 542.
Strouter vs. W. Virginia, 100 U. S., p. 307.
Cooley's Manual Const., 2d Edition, pp. 248, 256, *et seq.*, 260.

The contention of the relators is that at the time of the adoption of the Fourteenth Amendment each elector in the State of Michigan was entitled to vote *for all* the Presidential electors, and that this right has been placed by the amendment beyond recall.

If that be true it follows, of course, that the power of the State of Michigan to appoint Presidential electors in such manner as its Legislature may direct, no longer exists.

The State is absolutely bound by the method of appointment existing at the time of the adoption of the amendment. It also follows that it is beyond the power of the State to change the qualifications of Electors for President and Vice-President.

No such results were ever thought of in connection with the Amendment; and to the counsel for plaintiff in error belongs the distinguished honor of having made this astounding claim for the first time since the adoption of the Fourteenth Amendment.

The right to vote, as appears by the authorities above cited, is not conferred by the Constitution of the United States; but is dependent upon the legislation and Constitution of each State.

The Miner law, however, does not deny to any elector in the State of Michigan the right to vote for any Presidential elector. Under it each voter in the State of Michigan is entitled to vote for two Presidential electors and two alternate electors.

The sole object of the Fourteenth Amendment was to prohibit class legislation discriminating against some and favoring others; but legislation, which in carrying out a public purpose is limited in its application if within the sphere of its operation, it affects alike all persons similarly situated, is not obnoxious to it.

Barbier vs. Connelly, 113 U. S., 27.
Hayes vs. Mo., 120 U. S. p. 68.

The Miner law, as already shown, does not discriminate against any one; it treats all alike.

The right of any male inhabitant in the State to vote, referred to in the second section of the XIV

Amendment, must necessarily refer to the right to vote as established by the law and constitution of the State. If it does not, then it follows that *every male inhabitant* of the United States being a citizen thereof has *from the time of his birth* a right to vote for a Presidential elector. The contention is monstrously absurd. I apologize to the Court for taking its time upon it.

Otto Kirchner

Counsel for Def'n Gator

OCT 11 1892
JAMES H. McKENNEY,
CLERK

UNITED STATES OF AMERICA.

Supreme Court of the United States.

OCTOBER TERM, 1892.

TERM No. 1170.

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VS.

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CONTENTS.

Statement of the Case.

Historical facts prior to Federal Convention..... 1–5
Proceedings of Convention..... 5–14
Hamilton's Exposition in Federalist.....14, 15
Resolution of Congress for first election.....15–17
First Presidential election 1788.....19, 20
Second " " 1792.....20–22
Third " " 1796.....22–24
Fourth " " 1800.....24–32
Jefferson to Monroe.....25–27
Virginia Preamble..... 27
Action of Massachusetts.....27, 28
Action of Pennsylvania.....28, 29
Hamilton's proposal to Governor Jay.....29–31
Rejected by Jay..... 31
District method in subsequent elections.....32–39
Maryland Preamble..... 38
Legislative appointments considered..... 39
Presidential election 1824..... 40
Congressional Debate on District System.....40–44
Mr. McDuffie's speech..... 41
Mr. Everett's speech 42
Mr. Storr's speech..... 43
Michigan Electoral Law 1891..... 44
Partisan proceedings in State Senate..... 45
Unjust apportionments..... 45
Partisan purposes of act.....45, 46
Secretary of State refuses to follow former law...46, 47

State Supreme Court refuses mandamus.. 47
Argument.
First Proposition—Original design of Constitution 48
Second " District method under original design..... 60
Third " District method under electoral system as it is..... 62
Fourth " Fourteenth and Fifteenth Amendments..... 64
Fifth " Plenary power of States..... 71
Sixth " Erroneous reasoning exposed 74
Seventh " Judicial duty to recognize changed conditions and constitutional growth. 79
Eighth " Another view of Fourteenth Amendment..... 84
Ninth " Double or compound district system 89
Tenth " Conflict with act of Congress as to time electors meet..... 91
Eleventh " Alternate electors 93

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Respondent and Defendant in Error.

Brief for Plaintiffs in Error.

STATEMENT OF THE CASE.

The English colonies in America were distinct and separate communities, each of which had a government or political organization of its own. There was no such thing as a general organization or union, and no power to form one, although some of the colonies acted together in the common defense, as against the Indians, and in the wars between England and France, which resulted, a few years before the Revolution, in establishing the dominion of the English over Canada and the Northwest.

1 Curtis' Const. His. U. S., p. 1–4.

Lodge's His. Eng. Col. in Am., pp. 351–352, 367–370.

In *Scott's Development of Constitutional Liberty in the English Colonies of America*, p. 36, the author refers to the three kinds of colonial governments—provincial, proprietary, and charter—and then says:

"This diversity of constitution is owing to the different times and circumstances of settlement, and also to the different character of the settlers; and it shows how distinct the colonies were from one another. They were, in fact, separate and distinct bodies in separate and distinct territories. Each held the title to its territory by a grant separate and distinct from its neighbors, and, as allegiance was an act of the person and related to the crown, there was nothing else political whatever in common between them. The colony of Massachusetts was as distinct from the colony of Pennsylvania as it was from the colony of Jamaica. As colonies they were distinct and separate peoples; as far as their relations to the crown were concerned, each owed it its own individual allegiance, and the crown in return owed it protection and the enjoyment of granted franchises, without the slightest reference to any other colony. Had Virginia owed her allegiance to the crown of France, and Maryland her allegiance to the crown of Spain, they could not have been more distinct and separate bodies politic, in relation to each other than they were when both bore allegiance to the crown of Great Britain."

Such being the nature of the colonial governments and the character of their existence, it was inevitable that they should treat each other as equals when they came to act together in resisting the encroachments of the English government and achieving their own independence.

The first colonial congress was that of the Stamp Act Congress of 1765, in which nine colonies were represented.

In *5 Bancroft's His. U. S., p. 334*, the following statement is made with reference to their attitude towards each other:

"The members of this first union of the American people were elected by the representatives of the people of each separate colony. While they formed one body, their power was derived from independent sources. Each of the

colonies existed in its individuality; and notwithstanding great differences in their respective population and extent of territory, as they met in congress they recognized each other as equals, 'without the least claim of pre-eminence one over the other.'"

The first continental congress assembled in 1774. The method of voting was a matter of debate. The substance of the arguments made is set forth in the diary of John Adams.

2 Works of John Adams, pp. 365–368.

The second continental congress met in 1775, and at that and all subsequent meetings of that body each colony had one vote. This mode of voting was continued by the articles of confederation, which were in force from 1781 until the constitution took effect.

Art. 4: "In determining questions in the United States in Congress assembled each State shall have one vote."

Jefferson's notes on the debate on the adoption of that article may be found in *1 Elliot's Debates, pp. 74–78.*

The convention that framed the constitution also voted by States, the first standing order of that body being:

"A house to do business shall consist of the deputies of not less than seven States; and all questions shall be decided by the greater number of these States which shall be fully represented. But a less number than seven may adjourn from day to day." *1 Elliot's Debates, p. 164.*

The seventh and last article of the constitution framed by the convention is as follows:

"The ratification of the conventions of nine States shall be sufficient for the establishment of this constitution between the States so ratifying the same."

This made the separate and individual approval of nine of the States necessary in order to adopt the constitution at all, and made it possible for the new government to go into operation with four States left out, and each in the enjoyment of a separate independence.

The historical facts to which we have so far called attention are familiar to all, but it is necessary to bring them fully to mind again in order to prevent any possible misapprehension at the present time as to the original meaning of the provisions of the constitution for the choice of the chief magistrate.

These facts, at all events, will enable us to have a better understanding of the debates and deliberations of the convention which resulted in the adoption of the provisions of the constitution relative to the executive.

Beyond question, the most difficult problem presented to the convention was that of adjusting the rights of the States, particularly as between the great and the small States. The method of voting enabled the small States to protect themselves.

The principle that the legislative power ought to be vested in two houses was recognized at the outset by nearly all the delegates.

5 Elliot's Deb., p. 135.

It furnished an easy means of apportioning the legislative power, by providing for a Senate, in which the States should be equally represented, the "two Senators from each State to be chosen by the legislature thereof." On the other hand, a House of Representatives was created to represent the people of the United States. Members of the House to be "chosen every second year by the people of the several States," and to be apportioned among the States according to population on the basis of not more than one for every thirty thousand.

The choice of the national executive presented greater difficulties, and was a matter of great doubt and uncertainty until the very end of their deliberations.

On May 29, 1787, the third working day of the convention, Edmund Randolph, on behalf of the Virginia delegation, introduced a series of resolutions, the seventh of which was as follows:

"7. Resolved, that a national executive be instituted, to be chosen by the national legislature, for the term of —; to receive punctually at stated times a fixed compensation for the services rendered, in which no increase or dimunition shall be made so as to affect the magistracy existing at the time of the increase or dimunition; and to be ineligible a second time; and that besides a general authority to execute the national laws, it ought to enjoy the executive rights vested in congress by the confederation."

1 Elliot's Deb., 143–149.

5 Elliot's Deb., 126–127.

Randolph's resolutions were referred to a committee of the whole house to consider of the state of the American union.

The seventh resolution was first considered on June 1.

James Wilson, of Pennsylvania, was in favor of a single executive, elected by the people, although he was apprehensive an election by the people "might appear chimerical." Roger Sherman, of Connecticut, took strong ground in favor of an appointment by the legislature, as "he considered the executive magistracy as nothing more than an institution for carrying the will of the legislature into effect," and he ought to be "absolutely dependent on that body."

The only action the committee took was to fill up the blank so as to make the presidential term seven years.

June 2, Mr. Wilson moved that the executive be elected by electors chosen by the people in districts, into which the

States should be divided. The motion was defeated, only two States, Pennsylvania and Maryland, voting for it.

The clause in the resolution that the executive should be chosen by the national legislature for the term of seven years, was then agreed to by the same vote, eight States against two.

June 9, Mr. Gerry, of Massachusetts, moved that the national executive should be elected by the executives of the States, but the motion did not receive the affirmative vote of a single State.

June 18, during an elaborate speech before the convention, Alex. Hamilton read a paper containing his ideas of a suitable government. The assembly was to be elected by the people to serve for three years. The Senate to consist of persons elected to serve during good behavior. They were to be elected by electors chosen by the people in election districts into which the States were to be divided. The supreme executive was also to serve during good behavior; "his election to be made by electors chosen by electors chosen by the people, in the election districts aforesaid."

1 Elliot's Deb., 179.

In the copy printed in the Madison papers the second set of electors is omitted.

5 Elliot's Deb., 205.

June 19 (or 13) the committee of the whole reported the Randolph resolutions, as amended, back to the house, the number of the resolution relative to the executive being changed from the seventh to the ninth. It provided for a single executive chosen by the national legislature for seven years, without re-eligibility.

1 Elliot's Deb., 181, 182.

5 Elliot's Deb., 189, 190.

This resolution was not taken up by the house until July 17, when the clause for a single executive passed unanimously.

Gouverneur Morris, of Pennsylvania, moved to strike out "national legislature," and insert "citizens of the United States," and he and Mr. Wilson spoke in favor of the motion, but their own State of Pennsylvania cast the only vote in the affirmative.

Mr. Luther Martin, of Maryland, moved that the executive be chosen by electors appointed by the several legislatures of the individual States. Delaware and Maryland were the only States in favor of the motion.

The clause "to be chosen by the national legislature" was then unanimously adopted.

1 Elliot's Deb., 207, 208.
5 Elliot's Deb., 322, 324.

July 19, the convention reconsidered the several clauses of the ninth resolution relative to the appointment, duration, and eligibility of the national executive. A discussion took place on the question of re-eligibility, which brought out quite distinctly the fact that an appointment by the national legislature, especially if the executive was re-eligible, would destroy his independence and make the executive the subservient creature of the legislature.

This led Mr. Wilson and Mr. Madison to make the following remarks:

"Mr. Wilson. It seems to be the unanimous sense that the executive should not be appointed by the legislature unless he be rendered ineligible a second time. He perceived with pleasure that the idea was gaining ground of an election, mediately or immediately, by the people."

"Mr. Madison. If it be a fundamental principle of free government, that the legislative, executive, and judiciary powers should be *separately* exercised, it is equally so that they be independently exercised. There is the same, and perhaps greater, reason why the executive should be independent of the legislature than why the judiciary should. A coalition of the two former powers would be more immediately and certainly dangerous to public liberty. It is essential, then, that the appointment of the executive

should either be drawn from some source, or held by some tenure, that will give him a free agency with regard to the legislature. This could not be if he was to be appointable, from time to time, by the legislature. It was not clear that an appointment in the first instance, even with an ineligibility afterwards, would not establish an improper connection between the two departments. Certain it was that the appointment would be attended with intrigues and contentions that ought not to be unnecessarily admitted. He was disposed for these reasons to refer the appointment to some other source. The people at large was in his opinion the fittest in itself. It would be as likely as any that could be devised to produce an executive magistrate of distinguished character. The people generally could only know and vote for some citizen whose merits had rendered him an object of general attention and esteem. There was one difficulty, however, of a serious nature attending an immediate choice by the people. The right of suffrage was much more diffusive in the Northern than in the Southern States; and the latter could have no influence in the election on the score of the negroes. The substitution of electors obviated this difficulty, and seemed on the whole to be liable to the fewest objections."

5 Elliot's Deb., 337.

At the end of the discussion six States against three voted to have the national executive appointed by electors, and eight States against two voted to have the electors chosen by the State legislatures. A motion was made to apportion electors among the States as follows: Massachusetts, Pennsylvania, and Virginia, three each; Connecticut, New Jersey, New York, Maryland, North Carolina, and South Carolina, two each; New Hampshire, Rhode Island, Delaware, and Georgia, one each; total, twenty-five.

July 20 this apportionment was carried by a vote of six States against four, the four States voting no being New Jersey, Delaware, Maryland, and Georgia; New Hampshire and Rhode Island not voting.

1 Elliot's Deb., 212, 213.

5 Elliot's Deb., 338, 340.

July 24, the appointment of the executive by electors was reconsidered.

Mr. Houston moved that the executive be appointed by the national legislature and not by electors appointed by the State legislatures. "He dwelt chiefly on the improbability that capable men would undertake the service of electors from the more distant States."

Mr. Gerry "thought there was no ground to apprehend the danger urged by Mr. Houston. The election of the executive magistrate will be considered of vast importance and will create great earnestness. The best men, the governors of the States, will not hold it derogatory from their character to be the electors."

Mr. Strong thought the electors rendered the Government too complex. "He thought, also, that the first characters in the States would not feel sufficient motives to undertake the office of electors."

Mr. Williamson was in favor of going back to an appointment by the national legislature with ineligibility a second time. "The proposed electors would certainly not be men of the first, nor even of the second, grade in the States. These would all prefer a seat in the Senate or the other branch of the legislature." Mr. Houston's motion that the executive be appointed by the national legislature was then adopted, seven States against four.

5 Elliot's Deb., 358, 359.

July 25, the appointment of the executive was further considered.

Mr. Madison made quite a lengthy speech in which he restated the arguments against an appointment by the national legislature, and he commented adversely on some of the other methods that had been proposed.

He continued as follows:

"The option before us, then, lay between an appointment by electors chosen by the people and an immediate

appointment by the people. He thought the former mode free from any of the objections which had been urged against it, and greatly preferable to an appointment by the national legislature. As the electors would be chosen for the occasion, would meet at once, and proceed immediately to an appointment, there would be very little opportunity for cabal or corruption. As a further precaution it might be required that they should meet at some place distinct from the seat of government, and even that no person within a certain distance of the place at the time should be eligible. This mode, however, had been rejected so recently and by so great a majority that it probably would not be proposed anew. The remaining mode was an election by the people, or rather by the qualified part of them at large. With all its imperfections he liked this best.

"He considered the objection that an election by the people would give the larger States an advantage, and discussed the disadvantages the Southern States would be under because of their non-voting negro population. He then made the patriotic declaration that 'As an individual from the Southern States he was willing to make the sacrifice.'"

5 Elliot's Deb., 363, 365.

July 26, after some further discussion, the convention again adopted the resolution "that a national executive be instituted, to consist of a single person, to be chosen by the national legislature for the term of seven years, to be ineligible a second time," &c.

5 Elliot's Deb., 369, 370.

This resolution, now numbered "12th," was then referred with others, to the committee of detail, consisting of five members.

The convention then adjourned to August 6.

When the convention re-assembled the committee of detail reported the draft of a constitution, but section 1 of article 10 made no substantial change as to the appointment of the executive from the resolution referred to the committee, except that the national legislature in electing the executive should vote by ballot.

5 Elliot's Deb., 375, 380.

August 24, the section for the choice of the executive was taken up.

A motion was made to insert the word "joint" before the word "ballot."

"Mr. Sherman, of Connecticut, objected to it, as depriving the *States* represented in the *Senate* of the negative intended them in that house."

Other members from small States also opposed the motion, but it was carried by a vote of seven States against four.

A motion was then made to have the joint convention of the two houses vote by States, each State to have one vote.

This motion was defeated by a vote of five States against six.

5 Elliot's Deb., 472, 473.

At the same session a motion by Mr. Carrol to have the executive elected by the people was voted down, and so was a motion by Gouverneur Morris that he be chosen by electors to be chosen by the people of the several States. On the abstract question whether he should be "chosen by electors" there was an equal division—Massachusetts being absent. The further consideration of section 1, article 10, was then postponed.

August 31, this, with other undetermined matters, was referred to a committee of eleven—one from each State.

Mr. Madison was a member of this committee, and so were Mr. Carrol and Gouverneur Morris.

September 4, the committee of eleven made a report that the president and a vice-president should each hold office for four years, and that they should be elected as follows:

"Each State shall appoint, in such manner as its legislature may direct, a number of electors equal to the whole number of Senators and Members of the House of Representatives to which the State may be entitled in the leg-

islature. The electors shall meet in their respective States, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves; and they shall make a list of all the persons voted for, and the number of votes for each, which list they shall sign and certify and transmit, sealed, to the seat of the general government, directed to the president of the Senate. The president of the Senate shall in that house open all the certificates, and the votes shall be then and there counted. The person having the greatest number of votes shall be president, if such number be a majority of that of the electors; and if there be more than one who have such a majority and have an equal number of votes, then the Senate shall immediately choose, by ballot, one of them for president; but if no person have a majority, then, from the five highest on the list, the Senate shall choose, by ballot, the president; and in every case after the choice of the president, the person having the greatest number of votes shall be vice-president; but if there should remain two or more who have equal votes, the Senate shall choose from them the vice-president. The legislature may determine the time of choosing and assembling the electors, and the manner of certifying and transmitting their votes."

5 Elliot's Deb., 507.

Mr. Sherman said the object "of the report of the committee was to get rid of the ineligibility which was attached to the mode of election by the legislature, and to render the executive independent of the legislature."

"Mr. Randolph and Mr. Pinckney wished for a particular explanation and discussion of the reasons for changing the mode of electing the executive."

"Mr. Gouverneur Morris said he would give the reasons of the committee and his own. The first was, the danger of intrigue and faction if the appointment should be made by the legislature. The next was, the inconvenience of an ineligibility required by that mode in order to lessen its evils. The third was, the difficulty of establishing a court

of impeachment other than the Senate, which would not be so proper for the trial, nor the other branch, for the impeachment of the president, if appointed by the legislature. In the fourth place, nobody had appeared to be satisfied with an appointment by the legislature. In the fifth place, many were anxious even for an immediate choice by the people. And finally, the sixth reason was, the indispensable necessity for making the executive independent of the legislature. As the electors would vote at the same time throughout the United States and at so great a distance from each other the great evil of cabal was avoided. It would be impossible also to corrupt them."

5 Elliot's Deb., 508.

The plan reported by the committee was discussed more or less on September 4, 5, and 6, and a number of amendments were adopted. The discussion developed the feeling that too much power was being conferred on the Senate. Finally Mr. Sherman moved to strike out the words, "the Senate shall immediately choose," etc., and insert, "The house of representatives shall immediately choose by ballot one of them for president, the members from each State having one vote."

The motion was adopted by a vote of ten States against one.

5 Elliot's Deb., 519.

This took the power from the Senate, without depriving the States of their equal voice in making the choice.

Another significant amendment was the insertion of the following:

"But no person shall be appointed an elector who is a member of the legislature of the United States, or holds any office of profit or trust under the United States.

5 Elliot's Deb., 515.

September 12 the committee on style made their report, and September 17, 1787, the constitution was signed by the thirty-nine members present, who approved of the work of the convention.

5 Elliot's Deb., 558–565.

I have gone carefully through the proceedings and debates of the federal convention, in order to exhaust all possible means of ascertaining the meaning of the provisions of the constitution relative to the election of the president, at the time these provisions were framed and adopted.

In *1 Bancroft's History of the Constitution of the United States, 165–185*, he reviews the deliberations and action of the convention relative to the executive, but I was not entirely satisfied with his analysis for the particular purposes of this case, and thought the foregoing abstract might at least be of some additional assistance.

Reference is also made to the comments on the choice of the executive contained in *1 Curtis' Constitutional History of the United States, 349–351, 420–426, 455–457, 563–567.*

Strenuous efforts were made in a number of the States to defeat a ratification of the constitution, but it does not appear that the provisions for the election of the president and vice-president excited any particular animosity or were the subject of any serious controversy.

Hamilton's statements in regard to these provisions in the sixty-eighth number of the *Federalist* seem to have reflected the general judgment, as they did undoubtedly his own opinion and that of Madison. The following extracts are instructive:

"The mode of appointment of the chief magistrate of the United States is almost the only part of the system of any consequence which has escaped without severe censure, or which has received the slightest mark of approbation from its opponents. The most plausible of these who has appeared in print has even deigned to admit that the election of the president is pretty well guarded."

"It was desirable that the sense of the people should operate in the choice of the person to whom so important a trust was confided. This end will be answered by committing the right of making it, not to any pre-established body, but to men chosen by the people for the special purpose and at the particular juncture."

"It was equally desirable that the immediate election should be made by men most capable of analyzing the qualities adapted to the station, and acting under circumstances favorable to deliberation, and to a judicious combination of all the reasons and inducements which were proper to govern their choice. A small number of persons, selected by their fellow citizens from the general mass, will be the most likely to possess the information and discernment requisite to such complicated investigations."

"They have not made the appointment of the president to depend on any pre-existing bodies of men, who might be tampered with beforehand to prostitute their votes; but they have referred it in the first instance to the immediate act of the people of America, to be exerted in the choice of persons for the temporary and sole purpose of making the appointment."

"And they have excluded from eligibility to this trust all those who from situation might be suspected of too great devotion to the president in office."

Delaware was the first State to ratify the constitution, New Hampshire was the ninth, and Virginia and New York soon followed. North Carolina and Rhode Island remained out of the new union until after the first presidential election and the new government had been put in operation by the inauguration of Washington, and the new Congress, in the acts levying a duty on goods imported, had treated them, to a certain extent, as foreign States.

1 U. S. Stat. at Large, 48.

On the 13th day of September, 1788, Congress adopted a resolution fixing the first Wednesday in January, 1789, as "the day for appointing electors in the several States," and the first Wednesday in February as "the day for the elec-

tors to assemble in their several States and vote for president," and the first Wednesday in March as "the time and the present seat of Congress as the place for commencing proceedings under the said constitution."

In *Stanwood's History of Presidential Elections, p. 8*, are the following comments on this resolution of Congress:

"The interval of time before the appointment of electors was to take place was short. No preparations whatever had been made for an election in any of the States. It would have been idle, so many of the people must have thought, to pass laws for the choice of representatives and electors under a constitution which was so bitterly opposed as was that of 1787, and which might never go into effect. Accordingly it was necessary to begin with the preliminaries for an election only four months distant after the resolution of Congress was adopted. In those days communication was very slow. It would have been nearly impossible, in the time allowed, to have made full preparation for such an election as is that of electors to-day in some of the States. The news of the resolution in Congress would hardly reach some of the distant State capitals in two weeks. The governor must then issue a proclamation summoning the legislature, and again an allowance must be made for the slowness of the mails. Then would follow the meeting of the legislature and a discussion, perhaps prolonged, as to the manner in which the electors should be appointed; the passage of a law conferring upon the people the right to choose them; and the further preparations for the election. The general impression seems to have been that Congress intended, when it made the time so short, that the legislatures themselves should make the choice. 'It is evident,' wrote a newspaper correspondent at Philadelphia, on October 1, 1788, 'that Congress construe the constitution that the legislatures of the several States, not the people, are to choose the electors, as that body has ordered the choice of said electors to be on the first Wednesday of January, and their meeting for the choice of president four weeks later. For if the people, as hath been asserted, are to choose the electors, is it possible that in the large States of Massachusetts, Virginia, etc., the returns can be made for the choice, notice given to the persons chosen, and the persons

thus chosen have time to meet together in the short space of one month? No, it is impossible, and can only be remedied by the legislature, who, in fact, are 'the States' making the choice."

This probably accounts for the original introduction of the appointment of electors by the State legislatures.

From the remarks of Madison in the federal convention, and the explanatory comments of Hamilton in the *Federalist*, it is evident that legislative appointments were not originally contemplated.

It was perfectly human and natural for a State legislature to take these appointments into its own hands, but the shortness of the time allowed by Congress is the only excuse for the usurpation.

It is proper to say in this connection that the appointment of the electors by a State legislature would not be especially objectionable on principle, if the legislature was elected at the time, or about the time of the presidential election, so that the legislature would be elected by the people with reference to the performance by it of this important function.

The method of having her presidential electors appointed by the legislature prevailed in South Carolina until a new constitution was adopted under the reconstruction acts of Congress after the civil war, but under the first or prior constitution of that State the State election was held in October in the midst and almost at the close of each presidential campaign, and the legislature then elected assembled in November in time to appoint the electors within the period, or at the date fixed by Congress.

2 Constitutions & Charters, p. 1629, Sec. 10.

A legislature fresh from the people was sure to represent and voice the will of the State as to presidential candidates.

In 1788 and 1789, when resort was first made to appointments by the State legislatures, and for a number of years

after, the State constitutions of nearly all the States provided for an October State election at which members of the legislature were elected, and the members so elected constituted the legislatures who appointed the presidential electors, the 1789 appointments being made in January, and in subsequent presidential elections they were made in November. I can find no instance among the early constitutions where an old legislature held over after the State election, as is now the case in Michigan, the old legislature not going out until the first of January following the November election, and subject during that time to be called in special session.

There have been some instances, as we shall see, where a legislature elected long before the presidential election has undertaken to use its power to defeat and thwart the will of the people of a State, but this has been in plain conflict with the constitution and the principles of republican government it was designed to perpetuate. This much can be said as to legislative appointments, however—that they never were resorted to for the purpose of dividing or scattering the vote of a State. On the contrary, they were frequently adhered to, or newly resorted to, for the purpose of casting a solid presidential vote.

In one or two instances appointments by the legislature of the State did result in a divided vote, but it was due to exceptional and peculiar causes, which I will explain when these instances are reached.

I have merely made these comments now to clear my pathway as I go along, by showing that the method of appointing electors by State legislatures is in harmony, so far as solidity of vote and unity of State action are concerned, with the general ticket method. The use of these two methods has at all times, as I shall show, been immeasurably greater than any use that has ever been made of the district system.

First Presidential Election, 1788.

Only ten States participated in this election, North Carolina and Rhode Island not having ratified the constitution, and the State of New York lost its vote, because the two houses of its legislature could not agree on the method of appointment.

According to my best information in five of the ten States the appointments were made by the legislatures themselves, viz., in Connecticut, Delaware, Georgia, New Jersey and South Carolina.

In Pennsylvania and Maryland acts were passed providing for the election of their electors on a general ticket.

Penn. Acts, 1787, 1788, p. 513.
Md. Laws, 1788, Chap. 10.
2 Scharf's His. Md., p. 548.

In Massachusetts the general court, by a resolution, Nov. 18, 1788, divided the State into eight congressional districts, and provided for an election on Dec. 18, 1788, of a representative in each district.

It was then provided that at the same election the qualified inhabitants of each district should also give their votes for *two* persons, inhabitants of the district, "as *candidates* for an elector of the president and vice-president of the United States." From the *two* persons in each district having the greatest number of votes the two houses of the general court, by joint ballot, elected *one* as elector, and in the same way the two houses elected two electors at large, making ten in all.

8 Resolves of Mass., 1788–1792, p. 53.

In New Hampshire, according to *Stanwood, p. 10*, a system somewhat similar to that of Massachusetts, was adopted.

The people by general ticket nominated the electors, but the actual appointment on the day fixed by Congress was reserved for the legislature.

In Virginia the State was divided by the act of Nov. 17, 1788, into twelve separate districts, and on the day fixed by Congress an elector was elected in each district. For the election of congressmen the State was divided into ten other districts.

Laws of Va., Oct. Sess., 1788, pp. 1, 2.

There is not a particle of evidence that the State of Virginia adopted the district system for the purpose of giving some portion of the people of that State an opportunity to cast an electoral vote against George Washington, who was, with the consent and approval of the whole country, to be the unanimous choice of all of the electors for the first chief magistrate.

There is no reason to believe that there was a single candidate for elector anywhere who was opposed to Washington.

There may have been some difference of opinion as to the vice-presidency, and at the suggestion of Hamilton the electors in two or three of the States withheld some of their votes from Adams, so as to insure Washington's election for the first place.—*Stanwood, p. 14.*

Second Presidential Election, 1792.

Congress, by the act of March 1, 1792, fixed the time for appointing the electors in each State "within thirty-four days preceding the first Wednesday in December, 1792," and every fourth year thereafter; and the first Wednesday in December was the date fixed for the electors to meet and give in their votes.

1 U. S. Stat. at Large, p. 239.

In this election fifteen States participated, North Carolina and Rhode Island having ratified the constitution, and Vermont and Kentucky having been admitted.

In nine States the electors were chosen by the legislatures, viz., Connecticut, Delaware, Georgia, Kentucky, New Jersey, New York, Rhode Island, South Carolina and Vermont.

Maryland, New Hampshire and Pennsylvania each elected their electors on a general ticket.

In Massachusetts, the general court, by resolution June 30, 1792, divided the State into four districts, in two of which five electors each were elected, and in the other two three electors each were elected. A majority, as distinguished from a plurality, was required to elect, and if all or a sufficient number did not have a majority the two houses by joint ballot elected the number needed from those having "the highest number of votes in such district, and not elected, amounting to twice the number of electors wanting, if there be so many voted for."

9 Resolves of Mass., 1792–1798, p. 25.
Constitution of Mass., Chap. 1, Sec. 2, Art. 4.

Virginia, by the act of October 10, 1792, divided the State into twenty-one districts and provided for the election of one elector in each district at an election to be held "on the first Monday of November next, and every first Monday of November every fourth year hereafter."

Laws of Va., 1792, p. 87.

North Carolina, according to *Stanwood, p. 20,* resorted to a convenient makeshift.

"The apportionment in accordance with the census of 1790, under which North Carolina was entitled to ten members of the House of Representatives, did not become a law until April 13, 1792. The legislature was not then in session, nor did it meet again until the 15th of November. The electors were to meet under the law of 1792, on the 5th of December. There was not time in the interval to provide for a popular election. Accordingly the legislature

passed a law dividing the State into four districts and directing the members of the legislature residing in each district to meet on the 25th of November and choose three electors."

It is certain that the district method was not used in this election with any purpose of dividing the vote of either of the States in which it was adopted.

Massachusetts cast her sixteen votes for Washington and Adams, while Virginia, with twenty-one, and North Carolina, with twelve votes, voted solidly for Washington and Clinton.

The divergence on the vice-presidency is explained by the fact that the anti-federal party did not oppose the re-election of Washington, but made an unsuccessful effort to elect Governor George Clinton, of New York, vice-president, in place of John Adams.

Third Presidential Election, 1796.

This is the first presidential election in which there was a contest and in which the electoral system of the constitution was subjected to a real test of its merits. Sixteen States took part in the election, Tennessee having been admitted June 1, 1796.

As in 1792, in nine States the electors were appointed by the legislature, while Pennsylvania and New Hampshire adhered to the general ticket.

In Pennsylvania, Jefferson received fourteen electoral votes and John Adams one. I have not been able to ascertain the exact reason why one elector voted for John Adams, and do not know whether it was because one of the Republican candidates ran behind his ticket or whether it was for some other cause. "Scratching" some of the electors on general ticket resulted in a divided vote in New Jersey in 1860, and in California in 1880.

In Tennessee a State constitution was adopted in Feb-

ruary, under which the general assembly was to meet on the last Monday in March, and regularly thereafter on the third Monday in September.

April 23, 1796, an act was passed for the appointment of electors by joint ballot of both houses.

1 Scott's Laws of Tenn., p. 559.

Laws of Tenn., 1796, p. 29.

The foregoing act was repealed, and another act passed, Aug. 8, 1796.

1 Scott's Laws of Tenn., p. 584.

I have not been able to lay my hands on this act, but am informed that it divided the State into three districts, and to the end "that the electors may be elected with as little trouble to the citizens as possible," the act named twelve citizens in each of two districts, and nine citizens in the third district, "as electors to elect an elector for each of the three districts."

Massachusetts adhered to the district system, electing one elector in each congressional district by a majority vote. If no one had a majority, the legislature made the appointment on joint ballot; and the legislature appointed two electors at large in the same manner.

9 Resolves of Mass., 1792–1798, p. 276.

Seven electors were elected by the people in the districts, and seven other district electors and two electors at large, were appointed by the legislature.

These sixteen electors cast sixteen votes for John Adams, thirteen for Thomas Pinckney, of South Carolina, two for Samuel Johnson, of North Carolina, and one for Oliver Ellsworth, of Connecticut.

In Virginia the district system remained in force, and that State cast twenty votes for Thomas Jefferson and one vote for John Adams.

In North Carolina the district system was also used, and as a result John Adams received one of the twelve votes of that State and Thomas Jefferson received eleven.

In Maryland the State was divided by the act of December 24, 1795, into ten districts, and one elector was elected in each district.

Laws of Md., 1795, Chap. 73.

These ten electors distributed their two votes each as follows: Four voted for Adams and Pinckney; two for Adams and Henry; three for Jefferson and Burr; and one for Adams and Jefferson.

The total number of electors in all the States was 138, and 70 votes was sufficient to elect. John Adams received 71; Thomas Jefferson 68.

If Mr. Jefferson had received any two of the three single votes that were lost to him in Virginia, North Carolina, and Pennsylvania, he would have been elected, as that would have reduced the vote of Mr. Adams to sixty-nine and increased his to seventy.

On the other hand, if Mr. Adams had received the solid vote of Maryland, where he carried seven out of ten districts, and undoubtedly had a popular majority, he would have been elected without the aid of the three single votes mentioned.

This election, therefore, very clearly demonstrated to the leaders of both the Federal and Jeffersonian parties, and to the general public, that the district system, in the absence of an enforced uniformity throughout all the States, possessed the inherent weakness of dividing the vote and destroying the influence and weight of the States in which it was used in the choice of the president, and that it might be the instrument of great political injustice.

Fourth Presidential Election, 1800.

This is one of the most memorable and instructive elections in the political history of the country. The events

that led up to it will always be of great interest to those who desire to understand the causes which gave the Jeffersonian party the substantial control of the government for the next sixty years. The Federal party was guilty of the political indiscretion of placing the alien and sedition laws among the statutes of the United States. Jefferson and Madison responded with the Virginia and Kentucky resolutions, and the issue was made up. Both sides proceeded to strengthen their breastworks in the electoral college.

Colonel James Monroe was governor of Virginia, and James Madison, who had rendered distinguished services in the federal convention and in Congress, was now a member of the Virginia house of representatives. Jefferson, early in 1800, wrote to Monroe the following letter explaining the situation and giving his views as to what ought to be done with the district system in Virginia.

JEFFERSON TO MONROE.

"PHIL., *Jan.* 12, 1800.

"DEAR SIR: Yours of Jan. 4 was received last night. I had then no opportunity of communicating to you confidentially, information of the state of opinions here; but I learn to-night that two Mr. Randolphs will set out to-morrow morning for Richmond. If I can get this into their hands I shall send it, otherwise it may wait longer. On the subject of an election by a general ticket, or by districts, most persons seem to have made up their minds. All agree that an election by districts would be best if it could be general; but while ten States choose either by their legislatures or by a general ticket, it is folly and worse than folly for the other six not to do it.

In these ten States the minority is certainly unrepresented; and their majorities not only have the weight of their whole State in their scale, but have the benefit of so much of our minorities as can succeed at a district election. This is, in fact, ensuring to our minorities the appointment of the government. To state it in another form; it is merely a question whether we will divide the United States into sixteen or one hundred and thirty-seven districts.

The latter being more checquered, and representing the people in smaller sections, it would be more likely to be an exact representation of their diversified sentiments.

But a representation of a part by great and part by small sections, would give a result very different from what would be the sentiment of the whole people of the United States, were they assembled together.

I have to-day had a conversation with * * * who has taken a flying trip here from New York. He says they have now really a majority in the house of representatives, but for want of some skillful person to rally round, they are disjointed, and will lose every question.

In the senate there is a majority of eight or nine against us. But in the new election which is to come on in April, three or four in the senate will be changed in our favor; and in the house of representatives the county elections will still be better than the last; but still all will depend on the city election, which is of twelve members.

At present there could be no doubt of our carrying our ticket there; nor does there seem to be time for any events arising to change that disposition. There is, therefore, the best prospect possible of a great and decided majority on a joint vote of the two houses.

They are so confident of this, that the Republican party there will not consent to elect either by districts or a general ticket. They choose to do it by their legislature. I am told the Republicans of New Jersey are equally confident and equally anxious against an election, either by districts or a general ticket. The contest in this State will end in a separation of the present legislature without passing any election law (and their former one has expired), and in depending on the new one, which will be elected October 14, in which the Republican majority will be more decided in the representatives, and instead of a majority of five against us in the senate, will be of one for us. They will, from the necessity of the case, choose the electors themselves. Perhaps it will be thought I ought, in delicacy, to be silent on this subject. But you, who know me, know that my private gratifications would be most indulged by that issue which would leave me most at home. If anything supersedes this propensity, it is merely the desire to see the government brought back to its republican principles.

Consider this written to Mr. Madison as much as yourself, and communicate it, if you think it will do any good, to those possessing our joint confidence, or any others, where it may be useful and safe."

4 Jefferson's Works, p. 308.

Jefferson's letter seems to have had the desired effect, for January 20, 1800, the Virginia legislature passed an act adopting the general ticket.

Laws of Va., 1799, 1800, p. 3.

Mr. Madison approved, if he was not the author or father, of the following plain and unequivocal

PREAMBLE:

"Whereas, until some uniform mode of choosing a president and vice-president of the United States shall be prescribed by an amendment to the constitution, it may happen under the law of this commonwealth for appointing electors for that purpose, that a choice may take place contrary to the will of a majority of the United States, and also contrary to the will of a majority of the people of this State, which would be inconsistent with the true intent and meaning of the constitution of the United States; and although this commonwealth is willing to accede to any reasonable or proper amendment to the said constitution to remedy the said evil, yet for as much as it ought in the meantime to be counteracted by every constitutional regulation within the power of the legislature until it shall be so removed."

On June 6, 1800, the legislature of Massachusetts adopted a resolution providing that the sixteen electors of that State should be appointed by the joint ballot of the senate and house.

10 Resolves of Mass., 1798–1802, p. 175.

In *3 Bradford's History of Mass., p. 81*, referring to the presidential election of 1800, the author says:

"To secure the undivided vote of the State for Mr. Adams, this plan was adopted of electing by the legislature the majority of the members being known to be in his favor. If the former mode of voting in districts by the citizens had been adopted, several votes in the State would probably have been given for Mr. Jefferson. It was reasonable and proper, perhaps, to have the will of the majority in a State take effect in such cases, as otherwise the voice and influence of the State would be divided and of no avail in the decision or choice to be made."

At *p. 87*, *Bradford* refers to the fact that the presidential election of 1804 was the first in which use was made of the general ticket in Massachusetts. He then says:

"In 1800 they were appointed by the legislature; and the measure was a very unpopular one; and it was said the rights and privileges of the people were infringed thereby. The constitution of the United States provides 'that the electors should be chosen in such manner as the legislatures of the respective States should direct.' It was therefore concluded that the legislature could not justly appoint or choose the electors, but only direct and prescribe the mode in which they should be chosen by the people. The former measure was pretended to have been adopted, by those opposed to it, with party views, to gain all the votes of the State for Mr. Adams. The plan of voting for all the electors on one ticket, instead of choosing in separate districts, was supposed by many to be for a similar purpose. The members of the legislature were in general opposed to President Jefferson; and it was believed that as there was a majority of the citizens of the State dissatisfied with his political principles and measures, a general ticket would result in the choice of electors who would give their votes to one of different opinions and policy."

In Pennsylvania the situation and the result were both peculiar.

Stanwood, at p. 39, gives the following account:

"At that period it was common for the legislatures of the several States to pass a law providing for the appointment of electors every four years, the law expiring after each

election. This had been the practice in Pennsylvania from the beginning, and the people had always enjoyed the privilege of choosing the electors by popular vote. In the year 1796 fourteen Jefferson electors had been chosen and only one Adams man. But in the time of Mr. Adams' popularity the Federalists had carried the State once or twice and, as the Senators were elected by classes for four years, it happened that, in the year 1800, although the governor and the house of representatives were strongly Republican, the senate was still Federalist by 13 to 11. As no law had been passed providing for a popular election in time to enable the people to make a choice, it became the duty of the legislature itself to choose the electors. The house passed a law providing for an election by joint ballot, the only way in which the legislature of that state ever elected officers. The senate rejected the bill and proposed instead an election by concurrent vote. The house refused to adopt that method. At last the senate proposed that each house should name eight electors, and that the two houses should vote together for the combined list, or for fifteen of the sixteen. The house was forced to yield, and the result was that eight Jefferson and seven Adams electors were chosen."

It has been charged that it was the intention of the leaders of the federal party to prevent the State of Pennsylvania from having any voice in the election, by having the senate refuse its assent to any electoral law or to any appointments. As it was, the real voice or weight of the State was reduced to one vote; but the charge derives its principal interest from its bearing on what Hamilton proposed in the State of New York.

The New York legislature, that would under the existing law of that State appoint the electors, was elected in May. On the second of that month the result in the city of New York became known and indicated an anti-federal or republican majority in the legislature. Ex-Chief Justice John Jay was then the federal governor of New York and on May 7, Hamilton wrote to him the following letter:

HAMILTON TO JAY.

"NEW YORK, *May* 7th, 1800.

"DEAR SIR:—You have been informed of the loss of our election in this city. It is also known that we have been unfortunate throughout Long Island and in Westchester. According to the returns hitherto, it is too probable we lose our senators for this district.

"The moral certainty therefore is, that there will be an anti-federal majority in the ensuing legislature; and the very high probability is, that this will bring Jefferson into the chief magistracy, unless it be prevented by the measure which I now submit to your consideration, namely, the immediate calling together of the existing legislature.

"I am aware that there are weighty objections to the measure; but the reasons for it appear to me to outweigh the objections And in times like these in which we live, it will not do to be over scrupulous. It is easy to sacrifice the substantial interests of society by a strict adherence to ordinary rules.

"In observing this, I shall not be supposed to mean that anything ought to be done which integrity will forbid; but merely that the scruples of delicacy and propriety, as relative to a common course of things, ought to yield to the extraordinary nature of the crisis. They ought not to hinder the taking of a legal and constitutional step to prevent an atheist in religion, and a fanatic in politics, from getting possession of the helm of State.

"You, sir, know in a great degree the anti-federal party; but I fear you do not know them as well as I do. It is a composition, indeed, of very incongruous materials; but all tending to mischief—some of them to the overthrow of the government by stripping it of its due energies, others of them to a revolution, after the manner of Bonaparte. I speak from indubitable facts, not from conjectures and inferences. In proportion as the true character of the party is understood, is the force of the considerations which urge to every effort to disappoint it: and it seems to me there is a very solemn obligation to employ the means in our power.

"The reasonable part of the world will, I believe, approve it. They will see it as a proceeding out of the common course, but warranted by the particular nature of the crisis, and the great cause of social order.

"If done, the motive ought to be frankly avowed. In your communication to the legislature they ought to be told that temporary circumstances had rendered it probable that without their interposition the executive authority of the general government would be transferred to hands hostile to the system heretofore pursued with so much success, and dangerous to the peace, happiness, and order of the country; that under this impression, from facts convincing to your mind, you had thought it your duty to give the existing legislature an opportunity of deliberating whether it would not be proper to interpose and endeavor to prevent so great an evil by referring the choice of electors to the people distributed into districts.

"In weighing this suggestion, you will doubtless bear in mind that popular governments must necessarily be overturned, and while they endure, prove engines of mischief, if one party will call to its aid all the resources which vice can give, and if the other (however pressing the emergency) confines itself within all the ordinary forms of delicacy and decorum.

"The legislature can be brought together in three weeks, so that there will be full time for the object, but none ought to be lost.

"Think well, my dear sir, of this proposition; appreciate the extreme danger of the crisis; and I am unusually mistaken in my view of the matter, if you do not see it right and expedient to adopt the measure.

"Respectfully and affectionately yours, etc."

This letter was found among Governor Jay's manuscripts after his death, indorsed, says his son and biographer, in his own handwriting:

"Proposing a measure for party purposes which, I think it would not become me to adopt."

It is to be regretted that Michigan did not have a John Jay for governor in 1891.

Although an obstinate senate in Pennsylvania, and the existence of the district method in Maryland and North Carolina, caused a division of the electoral votes of each of

these States, Jefferson, and Aaron Burr his running mate, each received 73 votes, which was a majority of all of the electors. As Jefferson and Burr had an equal number of votes it devolved on the House of Representatives to decide between them.

A strong effort was made on the part of Burr, and some of the Federals, to elect Burr instead of Jefferson, president; but through the patriotic exertions of Hamilton, the scheme ultimately failed.

The plan of the constitution to have each elector vote for two persons without designating his choice for president and vice-president had developed two imperfections. If the electors of a political party did not concentrate their votes on the same two persons, the result would be in most close contests that the choice of one party would be elected president, and the choice of the other, vice-president. This is exactly what occurred in 1796 when John Adams was elected president and Thomas Jefferson vice-president. On the other hand, if the electors of each party all voted for the same two persons the election would devolve on the house every time, and furnish opportunities for conspiracies like that of Burr, to defeat the will of the country.

Between the presidential election of 1800 and that of 1804 the constitution was amended so as to require the electors to vote for the president and vice-president separately, and when the election devolves on the house the number from which a choice can be made was reduced from five to three.

The District Method in Subsequent Presidential Elections.

The action of the two most populous States of Virginia and Massachusetts in abandoning the district method in the election of 1800, but for opposite political or party reasons, settled the fate of that method, and it was only a question of time when it would entirely disappear.

It will only be necessary to trace the steps of its final departure.

North Carolina used the district system in 1808, the legislative system in 1812 and then adopted the general ticket, which has ever since prevailed.

Kentucky made use of the district system until 1824, and Tennessee until 1832; but in both States it prevailed in form only, because the State legislatures took particular care to so arrange the districts that neither State ever cast a divided vote.

Indiana used the district method in 1824 and 1828, but did not divide her vote.

Illinois used the district system in 1820, and 1824. Adams carried one district as against Jackson in 1824, and the system was abandoned before the presidential election of 1828.

Maine used the district method from 1820 to 1828, when Jackson carried one district, and took one vote from Adams. The general ticket was immediately adopted.

Massachusetts returned to the district method for the single presidential election of 1820, by a resolution passed June 15, of that year.

16 Resolves of Mass., p. 245.

But that was an election when there was absolutely no contest, and no political parties. President Monroe was re-elected without opposition and would have been unanimously re-elected by the electoral college, if one elector in New Hampshire had not thought it was "due to the memory of Washington, that no president after him should share in the honor of a unanimous election," and therefore cast his vote for John Quincy Adams.

In *3 Bradford's History of Mass., p. 268*, this election is referred to, and the superior excellence of the district system is shown, when there is no political contest, and no strain on it; and the system is on dress parade only:

"In 1820 the electors of president and vice-president of the United States were chosen by the citizens in districts. There were no political parties at the time, and but one prominent candidate presented to the people. Here is proof that this is the most natural and proper mode of choosing electors. It is only in time of party excitement that any other mode will be adopted, except that of general ticket, to which, in a small State, there can be no good objection. The people ought to vote for electors; and no intelligent man will vote for one with whose character and opinions he is unacquainted. Public agents should never perform any acts to which they are not appointed, and which it is the prerogative of the people themselves to do. The electors all voted for Mr. Monroe, the chief magistrate of the United States."

In the presidential election of 1824 Massachusetts adopted the general ticket, and has never since departed from it.

17 Resolves of Mass., p. 40.

New York followed the method of having her electors appointed by the legislature until and including the presidential election of 1824.

In that election a noted controversy occurred in that State in regard to these appointments.

Under the State constitution of 1821, only one-fourth of the members of the State senate went out each year, the others holding over from former elections, while the members of the State house of representatives and the one-fourth of the senate, were elected in October or November, a year before the presidential election.

2 Constitutions and Charters, p. 1342.

From 1804 until 1824, the candidates of the republican party for president and vice-president were nominated in each election by what was known as a congressional caucus, which was a meeting of the members of the two houses of congress belonging to that party.

February 14, 1824, a very poorly attended congressional

caucus nominated William H. Crawford, of Georgia, for president and Albert Gallatin, of Pennsylvania, for vice-president.

The Tammany democracy of the city and State of New York, under the leadership of Martin Van Buren, and the Albany regency was determined, as it had a majority of the legislature, to cast the vote of the State for Crawford, who had no such popular strength as to have carried the State by the general suffrage of its voters, or in a legislature wholly fresh from the people.

This plan, however, met with very great opposition and became very unpopular.

A concise statement of what took place is found in *3 Schouler's History of the United States, p. 312:*

"The Clinton wing, the great mass of the voters, demanded of the legislature a new law, which should give the choice of electors to the people, but the Tammany democracy were inflexible. Yates, the governor, who was fair-minded, took the popular side, so the regency dropped him for a re-election, and put up Samuel Young instead. Pushing discipline a step too far, the party which controlled the legislature removed Clinton from his office of canal commissioner, the honor of all honors which was rightfully his own. Clinton's fellow-citizens took his cause into their own hands. Immediately put in nomination for governor, he was elected in November, over Young, by 16,000 majority. Serene, though defeat impended, Van Buren perseveringly kept the legislature, or rather the senate, for here was the obstinate majority, to its purpose. Governor Yates had called an extra session of the legislature to compel, if possible, the passage of a bill giving the choice of electors to the people, but in vain. Seventeen senators took the odium of thwarting the clear wishes of the people on this point. The rebuke of the regency in the State election, and Clinton's return to power produced a panic in the legislature. Van Buren had strained its obstinacy too far. While he planned a coalition of the Crawford and Clay interests, and thought his main point secure, his friends in the legislature suddenly broke, and the electoral votes were scattered, Adams receiving the greater part of them."

The legislature made haste to pass an act for the choice of electors by the people, but adopted the congressional district system, which was used in the presidential election of 1828. The districts were so nearly equally divided, that although the district electors appointed two electors at large, Jackson only received four more votes than Adams, the vote of the State being Jackson 20, Adams 16.

Immediately after the election of 1828, by act of April 15, 1829, the general ticket was adopted, and no one in New York has since then proposed a return to the district system. For the most obvious political and partisan reasons, New York, now the most populous State in the union, has no desire to divide her electoral vote.

Maryland is the only State in the union that adhered to the district method, for any considerable length of time, after it resulted in a division of her electoral vote, and it deserves therefore more than a passing notice.

The State constitution of 1776, provided a peculiar method for the election of the members of the State senate. On the first day of September, 1781, and on the same day every fifth year thereafter, two persons were elected by the people in each county, and one person for Annapolis and Baltimore respectively, "to be electors of the senate." These electors met during the same month and elected "by ballot, either out of their own body, or the people at large, fifteen senators (nine of whom to be residents on the western shore, and six to be residents on the eastern shore), men of the most wisdom, experience and virtue, above twenty-five years of age, residents of the State above three whole years next preceding the election, and having real and personal property above the value of one thousands pound current money."

1 Constitutions and Charters, p. 822, Secs. 14, 15, 16.

The electoral system so provided for undoubtedly suggested the electoral system of the constitution for the choice

of the president, and shows the main purpose sought to be accomplished.

The Maryland senate continued to be so elected until 1838, thus covering all the time the district system for the choice of presidential electors was in use. *Id., 832.*

The house of delegates was composed of four members elected annually in each county, without regard to population. *Id., 820.*

The political power of the small counties on the eastern shore, enabled a minority of the people for a number of years to govern the State, and it explains why the district system for the choice of presidential electors was retained as long as it was.

In *3 Scharf's History of Maryland, p. 188,* is the following explanation of the effects produced in the State, by 1836, by the peculiar constitution of the two houses of the State legislature:

"By this system it will be seen that the smaller and less populous counties had as much political weight in the legislature as the larger; so that by the organization of the legislative powers, the counties of Kent and Calvert, with a population of nineteen thousand four hundred and one, were at this time allowed as many representatives in the senatorial electoral college and the house of delegates as the counties of Frederick and Washington, with a population of seventy-one thousand and fifty-six; and Kent and Calvert each, had double the number of delegates allowed to the city of Baltimore, with a population of eighty thousand six hundred and twenty-five. The executive department was the creature of the legislature, being elected thereby, and most of the civil officers received their appointment from the executive; so that the minority of one-fourth of the people, having the right to elect a majority of the members of the legislature, controlled all of the departments of the government.

"Since the adoption of the constitution of the State the resources of the western counties became developed, their fertile valleys densely populated, until the operation of the

government, as originally established, was to the city of Baltimore, and the western counties unjust and unequal. The lower counties refused to grant the reasonable and just rights of the western. Arraying themselves behind the strict letter of the constitution, they disregarded the great principles upon which it was originally based, and its inadequacy to the wants of the people at this time. They forgot the great change the State had undergone in point of population, commerce, and trade, in the space of sixty years, and that a constitution, which was republican in an earlier date of our history, in consequence of that change, was anti-republican now.

"The mode of electing the senate was particularly objected to, and the small number of representatives allowed Baltimore City. As early as 1807 a strong effort was made to change the system by electing one senator from each county by the people, and in the bill which passed the house for that purpose, an attempt was made to engraft a provision regulating the number of delegates for each county in proportion to its population. The bill, however, was defeated in the senate, and a similar one met with a like fate in the ensuing year. Year after year, repeated and earnest petitions were presented to the legislature, asking, praying for redress of those grievances of which a majority of the people had long complained. The smaller counties who had ruled for nearly half a century the majority of the people, declined to surrender the undue share of power they possessed."

The author then goes on to show that it took almost an open revolt and a resort to force to accomplish a reform of the Maryland constitution. I have not been able to find an account of the agitation which led to an abandonment of the district system for the choice of presidential electors. The main features of the discussion are clearly indicated by the preamble to the act of March 15, 1834, adopting the general ticket:

PREAMBLE.

"The mode adopted and long used in the State of Maryland of electing in separate districts of the State one or at most two electors from each district results in all cases of

contest in giving a divided vote to the candidate for the highest offices in the government, and a majority of the citizens of Maryland are thereby deprived of their just weight in the choice of the chief magistrate as compared with the majority of the citizens of most of the other States."

It appears, therefore, that since the presidential election of 1832, the district method has not been used by any State in the union. This is a total abandonment of sixty years, and when the reasons which led the States to this course are considered, it is certainly a most important and significant fact.

Legislative Appointments.

The method of having the electors appointed by the concurrent or joint vote of the two houses of the legislature of a State, was also abandoned as a part of the same evolution, and with nearly the same unanimity. South Carolina, with a legislature always fresh from the people, continued the practice until 1860.

All the other States had abandoned the system by 1828, except Delaware, and it was abandoned there before 1832.

During the reconstruction period, before all the southern States had been re-admitted to congress and the union, Florida used the legislative method for a single election, that of 1868, the legislature and State officers having been elected in May, and no other State election being provided for until 1870.

1 Constitutions and Charters, p. 349.

Colorado was admitted to the union August 1, 1876, and a legislature and State officers were elected on the first Tuesday of October. *Id., p. 225.*

To save the expense and trouble of another election, the legislature made the appointments for that year.

The legislative appointments in Florida and Colorado

were, therefore, provisional or temporary; and that method was resorted to because of the exceptional conditions, and not for the purpose of overcoming or overriding the political sentiments or preferences of a majority of the people in those States.

The movement which led to the adoption of the general ticket by all of the States, received its final impetus from the

Presidential Election of 1824.

The era of "good feelings," which caused James Monroe to be re-elected without opposition, was simply a calm before a storm.

In 1824, there was a general readjustment of party lines, and each of four different candidates for president, received a respectable vote in the electoral college. No choice having been made by the people, the election devolved on the house of representatives, and John Quincy Adams was elected, receiving the votes of thirteen states, to seven for Andrew Jackson and four for William H. Crawford.

On a membership vote the Jackson and Crawford men had a majority in the house of representatives of 125 to 87.

Stanwood's His. of Pres. Elections, p. 95.

There was great dissatisfaction with the result of this election, and at the congressional session of the winter of 1825 and 1826, Mr. McDuffie, of South Carolina, introduced two resolutions in the house. His first resolution proposed to take all power over an undecided presidential election from the house of representatives. His second resolution proposed to establish a uniform system of districts throughout all the States, each district to have one vote.

2 Cong. Deb., part 1, p. 1365–1395.

The debate on these resolutions was a long and interesting one. The first resolution received 138 yeas and 52

nays. The second resolution was defeated by a vote of 90 yeas; 102 nays.

2 Cong. Deb., part 2, p. 2004.

The arguments which brought the house of representatives to so decided a rejection of the proposed uniform district system, can be shown by a few extracts from the debates.

2 Cong. Deb., part 1, pp. 1365, 1407, 1574.

Mr. McDuffie, in opening the debate in favor of a uniform system of districts, showed the want of uniformity that had so far prevailed, and urged the adoption of a uniform system of some kind. As between the different systems then in use, he preferred the district system. Among other things he said:

"But an argument in favor of the proposed amendment results from the obvious propriety of establishing not only a permanent but a uniform system of voting for the president in all of the States. It is not merely for the sake of constitutional symmetry that this uniformity is desirable, but it is indispensable to the existence of that political justice which is the bond and cement of our union. To illustrate the nature and extent of the evil growing out of the want of a uniformity in the modes of voting in different States, I will state a case which, so far from being extreme, will probably occur at the very next presidential election, if this amendment be not adopted. New York has established the district system; Virginia still adheres to the general ticket system. Let us suppose the people of New York, entitled to thirty-six electoral votes for president, to be divided in opinion between two rival candidates, in the proportion of nineteen to seventeen. The result would be that she would give nineteen votes to one candidate, and seventeen to his opponent, leaving a majority of two votes only in favor of the candidate who stood highest in her confidence. Let us now suppose the people of Virginia, entitled to twenty-four votes, to be divided in opinion between the two rival candidates, in the proportion of thirteen to eleven.

Voting by the general ticket, she would give the whole of the electoral votes of the State to her favorate candidate. It is thus apparent that New York, voting by districts, would exert only one-twelfth part of the power in the election of the president that Virginia, voting by the general ticket, would exercise, when in point of fact, the people of Virginia would be as much divided in opinion between the competing candidates as the people of New York. The gross and palpable injustice of permitting such a state of things to continue must be apparent to every one. It is not in the nature of things that any State can submit to such political inequality. *However striking the superiority of the district system may be considered by the people, whatever may be its intrinsic excellence, all the States must abandon it and establish the general ticket system, in self-defense, unless we establish a uniform district system for the whole union.*"

Mr. Everett of Massachusetts made an argument against the proposed amendment, and in reply to Mr. McDuffie, among other things, said:

"In respect to the controversy which forms a leading part of the honorable gentleman's argument, the alternative of the general ticket and district system, I have not much to say: the rather, as I conceive the practical operation of the two systems to come nearly to the same thing. I say this on grounds of reasoning, and I am not aware that there is anything in experience, to bring us to a different conclusion. The two systems, in the long run, must come to the same thing. On the general ticket system, supposing it to be uniformly adopted throughout the United States, the unrepresented minorities would be balanced by each other; or in other words, the minority, whose voice is not heard in one State, on one side of the question, would be balanced by the minority, whose voice is not heard in another State, on another side of the question. On the district system the same result would take place. The minority represented in the electoral colleges, on one side of the question, in one State would be balanced, and being balanced would be neutralized by the minority represented in another State, on the other side of the question; and therefore, in their practical application, there would be very little to choose between the two systems.

"I grant to the gentleman from South Carolina that diversity in this respect is an evil. It is an evil that one State should appoint its electors in one way, and another State in another way. I admit that this is an evil for which a remedy is desirable; though I do not know, if no other remedy could be applied, whether it would be expedient (if it were competent to us), to alter the constitution for this purpose. But the gentleman himself tells us there is another remedy. He says that as the constitution now is, without any alteration, *the States will all be led to adopt the general ticket system. What more do we want as far as uniformity is concerned? If the States will all adopt the general ticket system, without any amendment to the constitution, then the only evil which I admit to exist, is remedied;* for I maintain that it is no evil that the general ticket system should prevail, rather than the district system, because in their practical operation they must come to the same result. In the few observations, therefore, which I have to make on this part of the gentleman's argument, I desire to be understood not so much as being opposed to the district system, as wishing to show that some of those inconveniences, which he traces to the general ticket system, are equally incident to the district system; and that others flow, not from this or that system, but from human nature itself, and are evils inseparable from any kind of choice."

Mr. Storrs, of New York, in reply to Mr. McDuffie said:

"If perfect equality of political power can be attained in all the States, I am not certain that I should prefer to adopt the district system; but under the present distribution of the elective power (which this amendment leaves untouched), there is not to my mind, any value in this principle of uniformity but in its name, and its introduction may be adapted to produce very great inequalities in the result of its application. The comparison which the gentleman drew with great accuracy, between the present operations of the different elective systems adopted in the States of New York and Virginia, presented the results of these diverse adjustments of this State power in a very striking light. It may well happen in so large a State as New York, where no direct common interest or general influence is in active operation, that her electoral vote may be divided between

two persons in the ratio of 19 to 17, while in Virginia her undivided strength of 24 votes may be given to one of the candidates, and thus produce the singular result that the effectual power of New York in the election would stand, as the gentleman justly concluded, compared with Virginia, as only 2 to 24. He asks us, "If such injustice could be tolerated." *There is a plain remedy for all this yet within the control of the people of New York, which may preserve to that State her real elective power, and at the same time, preserve also their constitutional equality of right in the election. To correct this possible unequal result, by districting the State of Virginia, might virtually annihilate the entire power of both these large States; but if New York should change her present system and adopt the plan of a general ticket, she may resume her proper influence, and both States may retain their respective constitutional power in the presidential election.*"

There is no doubt but that the country acted upon the principle declared by Mr. McDuffie to be inevitable (under the existing conditions, as a matter of political self defense by each of the States, as against the others), and advocated by Mr. Everett and Mr. Storrs as an entirely proper and satisfactory adjustment of the controversy.

Except as to the single State of South Carolina, the general ticket was the universal rule after 1832, and it prevailed in *nearly* all the States in 1828 and 1832.

The Michigan Electoral Law of 1891.

It is a part of the political history of the country, of which the court will take judicial notice, that from the organization, within its own territory, of the present republican party in 1854, down to the presidential election of 1888, the State of Michigan has adhered with unswerving fidelity to the candidates and principles of that party. There is not a single instance during all that period, when the opposition to the republican party has had a majority in either house of the State legislature.

The political "off year" of 1890 gave the opponents of the

republican party a majority in each house, and placed a democrat in the governor's chair.

The presence of two patrons of industry in the senate, deprived the democratic party of a clear working majority in that body, and was an obstacle to extreme partisan measures. To avoid this difficulty two republican senators were unseated in favor of their democratic competitors, by proceedings falling but little, if any, short of actual force.

These proceedings were upheld, or more correctly speaking, were held to be beyond judicial cognizance, by a divided state supreme court. The opinions of the judges furnish us with an authoritative and convenient record of the proceedings of the legislature in question.

Auditor General *vs.* Board of Supervisors, 51 N. W. Rep., 483, 498.

With the senate so reorganized the legislature proceeded to pass the new apportionment acts required by the census of 1890.

The act dividing the State into senate and representative districts was so unjust that the state supreme court was constrained to declare it invalid; and here again we have an ample and convenient record.

Giddings *vs.* Blacker, 52 N. W. Rep., ——.

This legislature was elected at the November election in 1890, to serve from January 1, 1891, to December 31, 1892, and of course there was no suggestion or belief on the part of any one in the State, at the time of the election, that it would interfere in any way with the action of the State in the presidential election of 1892, or that it would undertake to draw unto itself the possible appointment of any of the electors of president and vice-president. Fully convinced that their ascendency in the State government was accidental and temporary, they sought to deprive the people of the State of their rightful weight and influence in the presidential contest now drawing to an end.

For that purpose an act was passed, commonly known as the Miner law, by which the district method for the choice of electors is adopted. The act provides that one elector shall be elected in each of the twelve congressional districts, and for the choice of the other two electors, the State is divided by congressional districts into two large districts, in each of which a single elector is to be chosen.

To make sure that the contemplated division of the electoral vote of the State should not be interfered with, by the filling of vacancies, the act provides for the election of an alternate elector in each of the fourteen districts, and with no other function than that of supplying a vacancy in their respective districts, if one should occur; and in case any two candidates for elector shall have the highest, and an equal number of votes, the legislature by joint ballot is to choose between them, at a special session to be called by the governor.

A special session is required to be called for that purpose, although a new legislature fresh from the people is to assemble on the first Wednesday in January, in ample time to determine tie votes, or to fill vacancies before the second Monday of January, the date now fixed by congress for the electors to meet and cast their votes.

This is all explained by the mistake of the framers of the act in following the old act of congress and providing that the electors shall meet on the first Wednesday of December, before the term of office of the existing legislature will terminate.

The relators and plaintiffs in error having been nominated for electors by the republican party, and desiring to test the validity of this electoral law, applied to the secretary of state and requested him in giving notice, as he is required by law to do, of the number of electors to be voted for, to ignore the new act as invalid, and to give notice that fourteen electors were to be elected on a general ticket as under former laws.

The secretary of state declined to comply with this request, and thereupon the relators applied to the supreme court of the State for a writ of mandamus to compel him to do so.

On a hearing in the supreme court the Miner law was held to be constitutional and valid. The opinion of the court is returned with and is printed as a part of the Record in this case.

From this opinion it appears that the judgment of the court was based:

1. On the contemporary practice of some of the States in making more or less use of the district system during the first forty years of the existence of the constitution.

2. On the plenary power reserved to the States by the constitution over these appointments.

The writ of mandamus is in Michigan an appropriate remedial writ for the purpose of obtaining the relief prayed, and the state supreme court unhesitatingly passed upon the merits of the constitutional questions presented.

The relators bring the case to this court by writ of error.

ARGUMENT.

I.

The great object and design of the constitution was to have the electors in each State act as a deliberative body, and by the exercise of a wise judgment and discretion by all of the electors to secure an executive who would administer his great office for the general good, and not as the leader or representative of the dominant political party; but as to this, its first and main object and purpose, the constitution speedily proved itself to be a complete failure.

The truth of the above proposition is so plainly apparent, that it would be superfluous to say anything in support of it, if it were not for its transcendent importance in this case, and the need of having it, in all its force, fresh in mind, in order to fully appreciate the propositions to follow.

The framers of the constitution, were of course perfectly familiar with the executive branch of the English government. The colonial governors had for the most part been appointed by and represented the crown, and they had not hesitated to exercise their power of absolute veto on colonial legislation; and a still further veto was reserved to the crown itself.

One of the grievances set forth in the declaration of independence is that the king of Great Britain "has refused his assent to laws the most wholesome and necessary for the public good."

And yet they believed that a veto power of some kind should be vested in the executive, and they did not see how this could be effectively accomplished if the national legislature appointed the executive. They also realized that that method of appointment would interfere with the practical workings of the plan to vest the sole power of impeachment in the house of representatives and the sole power to try impeachments in the senate.

From their standpoint it seemed absolutely necessary to provide for a method of appointment that would make the executive independent of the legislative department of government.

It must be remembered in this connection that at the time of the adoption of the constitution, what is now known in England as a responsible government had not yet been fully established, and its superior utility and value in the conduct of the affairs of a great and powerful people were not fully demonstrated or made known.

Assuming that the present English prime minister is well informed, I shall, without reference to any parliamentary history of England, quote the following extract from his article in vindication of home rule for Ireland in the current October number of the North American Review, *p. 390.*

"In 1782, responsible government, that is to say an executive directly dependent on the majority of the popular chamber, did not yet formerly exist, even in England. Mr. Pitt, in 1783, did not resign, nor did he at once dissolve, when condemned by the house of commons, but abode his time, and the majority of the house was undisguisedly on the side of his opponents during the interval."

The author's preface to Judge Story's *Commentaries on the Constitution of the United States* is dated January, 1833. Citing *Rawle on the Constitution, Ch. 5, pp. 54–58,* Judge Story (*5th ed., 2 Vol., p. 311*) made these comments:

"It has been observed with much point, that in no respect have the enlarged and liberal views of the framers of the constitution, and the expectations of the public when it was adopted, been so completely frustrated as in the practical operation of the system so far as relates to the independence of the electors in the electoral colleges. It is notorious that the electors are now chosen wholly with reference to particular candidates, and are silently pledged to vote for them. Nay, upon some occasions, the electors publicly pledge themselves to vote for a particular person; and

thus, in effect, the whole foundation of the system, so elaborately constructed, is subverted. The candidates for the presidency are selected and announced in each State long before the election; and an ardent canvass is maintained in the newspapers, in party meetings, and in the State legislatures, to secure votes for the favorite candidate, and to defeat his opponents. Nay, the State legislatures often become the nominating body, acting in their official capacities, and recommending by solemn resolves their own candidate to the other States. So that nothing is left to the electors after their choice but to register votes which are already pledged; and an exercise of an independent judgment would be treated as a political usurpation, dishonorable to the individual, and a fraud upon his constituents."

In the late Mr. Justice Miller's *Lectures on the Constitution of the United States, p. 149*, is the following:

"As originally adopted, and as it now exists, it was supposed that the body of electors interposed between the State legislatures and the presidential office would exercise a reasonable independence and fair judgment in the selection of the chief executive of the national government, and that thus the evil of a president selected by immediate popular suffrage on the one side, and the opposite evil of an election by the direct vote of the States in their legislative bodies on the other, would both be avoided. A very short experience, however, demonstrated that these electors, whether chosen by the legislatures of the States, as they were originally, or by the the popular suffrage of each State, as they have come to be now, or by limited districts in each State, as was at one time the prevailing system, are always but the puppets selected under a moral restraint to vote for some particular person who represented the preferences of the appointing power, whether that was the legislature or the more popular suffrage by which the legislature itself was elected. So that it has come to pass that this curious machinery is only a mode of casting the vote to which a State is entitled in the election of president in favor of that candidate who is the favorite of the majority of the people entitled to vote for the more popular branch of the State legislature in each State."

In an English history of the United States I find the following estimate of our electoral system:

"The original method of election was an elaborate and strangely obvious blunder."

After describing the system the author continues:

"The machinery broke down at once. The electors, having no other function, were chosen simply to give a mechanical vote for the candidate favored by their constituents; the election which was meant to be freely made by the best men of the several States, became direct and primary, yet unpopular; inasmuch as a popular minority may cast a majority of the electoral votes. At the same time the machinery renders it possible that the candidate chosen might have a majority neither of the States nor of the people. The mode of election by the house is equally unsatisfactory, as a weak party minority might command a majority of State votes. To secure an election by the colleges became at once a paramount object; leading to the nomination of party candidates, first by a 'caucus' of the party senators and representatives, and afterwards by 'conventions' nominally elective, but really chosen by the political wire-pullers of each faction.

"The original mode of voting for president and vice-president together entailed further absurdities and inconveniences. If many votes were 'scattered'—that is, given to candidates who command but a small following—the president was chosen by one party, the vice-president, his possible substitute, by the other; so that accident might at any moment transfer the executive power to the nominee of the minority. If party discipline was strict, the two candidates of the majority received an equal vote; the decision fell to the house of representatives, and party intrigue might place in the presidential chair a man whom his supporter meant for the secondary and, under ordinary circumstances, unimportant office."

The author next refers to the causes which led to the adoption of the twelfth amendment, and he then says:

"But another dangerous consequence which the framers of the scheme might well have foreseen has endured to the present day. The vice-president has as such no function, except to preside over the debates of the senate and give a casting vote when the numbers are equal. Hence the office is constantly bestowed on a mere electioneerer, or local demagogue, to secure the support of a local faction, or of a particular State. The possibility of his succession is too remote to affect the choice. Yet in less than a century four presidents have died in office, and mere chance has transferred a post more important than our premiership to men never meant, and no wise qualified for any higher duty than that to which they were nominated—to put the question and announce the result of decisions from the chair of the senate."

1 Greg's History U. S., 344, 346.

Nothing shows the desire of the framers of the constitution to make the electoral colleges independent and deliberative bodies more surely than their care in inserting the requirement that "no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector."

And yet, under the system now in existence, these disqualifications are of no practical consequence whatever, because there is no pretense that the electors exercise any judgment of their own. They would answer every present purpose if they were wooden automatons.

The fact that under the changed conditions that have so long existed the disqualifications of the constitution are of no practical consequence undoubtedly had its effect upon the opinions and judgments of the learned judges of the Supreme Court who were members of the electoral commission of 1877, which disposed of a number of cases of alleged disqualification.

In the Florida case one of the Hayes electors had held the office of shipping commissioner at Pensacola, under an appointment by the United States circuit court. Before the

election he had tendered his resignation to the circuit judge, who had, when out of court, and while at Newark, Ohio, accepted the resignation. It was claimed that this resignation and acceptance was ineffectual and that in law he remained in office.

In the Louisiana case, two of the Hayes electors held offices of profit and trust under the United States on the day of the election, one being a commissioner of the United States circuit court, and the other surveyor-general of the Louisiana land district.

These electors before the day the electors were to meet resigned the offices of profit and trust held by them, and when the electors met they failed to attend, thereby creating vacancies. The other electors appointed the two absent persons to fill their own vacancies, and thereupon they both appeared and acted and voted as electors.

In the Oregon case one of the Hayes electors on the day of the election held the office of postmaster. Before the electors met he resigned the office of postmaster, and when they met he also resigned the office of elector. The other electors then appointed him to fill the vacancy, and he acted and voted as an elector.

Any one would naturally suppose that the peremptory language of the constitution, "but no senator or representative, or person holding an office of trust or profit under the United States, *shall be appointed an elector*," would make any appointment absolutely void, where the appointee at the time of the appointment was disqualified.

Two of the learned justices who were members of the electoral commission so construed the constitution, viz., Mr. Justice Clifford and Mr. Justice Field.

Electoral Count of 1877, pp. 989, 1058.

It is difficult to believe that the other three justices who were members of the commission would not have reached

the same conclusion if they had had before them a typical case under the original design of the constitution.

To state a case:

Suppose, in the first place, that the electoral colleges were, in point of fact, deliberative bodies, exercising a wise judgment and a sound discretion in the selection of a non-partisan executive.

Then suppose one or more influential senators or representatives in congress or members of the cabinet, had sought and obtained appointments as electors, and had taken part in the deliberations of the electoral colleges, or of some of them, and by their own votes had succeeded in re-electing their chief to his high office.

Under such circumstances, would a resignation of the disqualifying office, between the appointment of the electors and the meeting of the electoral colleges—only to resume the same or a better office afterwards—render the appointment valid and wholly unobnoxious to the constitution?

With such a case, would any member of the highest court in the land—charged with the especial duty of enforcing the constitution—hold that there was no power in the federal government anywhere to reject such a vote; and if there was any such authority, that the votes of the disqualified electors must be held perfectly valid, as the votes of *de facto* public officers.

In the Florida case the return of the majority of the electoral commission to congress was:

"As to the objection made to the eligibility of Mr. Humphreys, the commission is of the opinion that, without reference to the question of the effect of the vote of an ineligible elector, the evidence does not show that he held the office of shipping commissioner on the day when the electors were appointed."

Electoral Count of 1877, p. 200.

In the Louisiana case the return was:

"The commission, by a majority of votes, is also of the opinion that it is not competent to prove that any of said persons so appointed electors as aforesaid held an office of trust and profit under the United States at the time when they were appointed."

Electoral Count of 1877, p. 426.

The Oregon return:

"That although the evidence shows that Watts was a postmaster at the time of his election, that fact is rendered immaterial by his resignation, both as postmaster and elector, and his subsequent appointment to fill the vacancy so made."

Electoral Count of 1877, p. 640.

Mr. Justice Miller, in his opinion or remarks on the Florida case, said:

"The constitution declares that no person holding an office of trust or profit under the United States shall be appointed an elector, and the objectors to certificate No. 1 propose to give evidence to show that Mr. Humphreys, one of the electors named in that certificate, was at the date of his election holding the office of shipping commissioner under the appointment of the circuit court of the United States for the district of Florida. There are two reasons why I do not think such evidence admissible. The first is that the inquiry comes too late, because Mr. Humphreys, acting under the credentials which the law prescribes as his authority, has already cast his vote for president and vice-president. That vote being a fact accomplished, cannot be annulled by any subsequent proceeding to question his eligibility. The second is, that like many other provisions of the constitution, it is not self executing; and as no means of enforcing it have been provided it remains ineffectual, save as its directions shall be observed by those who appoint the electors."

Electoral Count of 1877, p. 1009.

Mr. Justice Strong held that congress, and therefore the electoral commission, had no power to go behind the determination of the State canvassing boards, and that any such judicial inquiring by authority of the State must take place, in order to be effective, before the electors meet to cast their votes.

Upon the question of eligibility presented by the Oregon case, he said:

"A few words in regard to the ineligibility of Watts. I believe that neither this commission nor congress has any power under the constitution to judge of the qualifications of a State elector, no more than we have to judge of the State election and returns. Ineligibility is a disqualification. But I will not discuss the question of our power; I have sufficiently discussed it heretofore. If it be conceded that Watts was ineligible on the 7th of November, the day of the election, his disqualification ceased on the 14th of that month, and there was nothing in the way of his appointment on the 6th of December."

Electoral Count of 1877, p. 1005.

Mr. Justice Bradley was the fifth Supreme Court judge appointed, as provided by the act of congress, as the final arbiter. In the Florida case he disposed of the question of ineligibility as follows:

"It is further objected that Humphreys, one of the Hayes electors, held an office of trust and profit under the government of the United States at the time of the election and at the time of giving his vote. I think the evidence of this fact should be admitted. Such an office is a constitutional disqualification. I do not think it requires legislation to make it binding. What may be the effect of the evidence now produced I am not prepared to say. I should like to hear further argument on the subject before deciding the question.

"[It being shown that Humphreys resigned his office before the election, the question of ineligibility became unimportant. Justice Bradley held, however, that the constitutional prohibition, that no member of congress or officer

of the government should be appointed an elector, is only a form of declaring a disqualification for the electoral office, and does not have the effect of annulling the vote given by one who, though disqualified, is regularly elected, and acts as an elector; likening it to the case of other officers *de facto*."

Electoral Count of 1877, p. 1025.

In the Louisiana case, Mr. Justice Bradley resumed the question of ineligibility, and discussed it somewhat at length:

"Though not necessary to the decision of this case, I have re-examined the question of constitutional ineligibility since the Florida case was disposed of, and must say that I am not entirely satisfied with the conclusion to which I then came, namely, that if a disqualified elector casts his vote when disqualified, the objection cannot be taken. I still think that this disqualification at the time of the election is not material, if such disqualification ceases before he acts as an elector. But, as at present advised, I am inclined to the opinion that if constitutionally disqualified when he casts his vote, such vote ought not to be counted.

"I still think as I thought in discussing the Florida case, that the form of the constitutional prohibition is not material; that it is all one whether the prohibition is that a federal officer shall not *be* an elector, or that he shall not be *appointed* an elector. The spirit and object of the prohibition is to make office-holding under the federal government a disqualification. That is all. And this is the more apparent when we recollect the reasons for it. When the constitution was framed, the great object of creating the office of electors to elect the president and vice-president was to remove this great duty as far as possible from the influence of popular passion and prejudice, and to place it in the hands of men of wisdom and discretion, having a knowledge of public affairs and public men. The idea was that they were to act with freedom and independence. The jealousy which was manifested in the convention against the apprehended influence and power of the general government, and especially of the legislative branch, induced the prohibition in question. It was feared that the members of the houses of congress and persons holding office

under the government would be peculiarly subject to these influences in exercising the power of voting for the chief magistrate. It was not in the process of appointment that this influence was dreaded, but in the effect it would have on the elector himself in giving his vote.

"It seems to me, therefore, that if a person appointed an elector has no official connection with the federal government when he gives his vote, such vote cannot be justly excepted to; and that substantial effect is given to the constitutional disqualification if the electoral vote given by such officer is rejected. And my present impression is that it should be rejected.

"Circumstances, it is true, have greatly changed since the constitution was adopted. Instead of electors being, as it was supposed they would be, invested with power to act on the dictates of their own judgment and discretion in choosing a president, they have come to be mere puppets, elected to express the preordained will of the political party that elects them. The matter of ineligibility has come to be really a matter of no importance, except as it still stands in the constitution, and is to be interpreted as it was understood when the constitution was adopted. Hence we must ascertain, if we can, what was its original design and meaning, without attempting to stretch or enlarge its force."

Electoral Count of 1877, pp. 1033, 1034.

Mr. Justice Bradley, with his high mental discipline and habits of judicial inquiry, instinctively called attention to the changed conditions in the electoral system, and the wide departure from the original plan of the constitution, and while he declared that he was endeavoring to enforce the constitution as it was understood when it was adopted, it is now apparent to the impartial student that he and the other members of the majority of the commission were perceptibly and rightfully influenced by the fact that under the existing electoral system it would be the height of political injustice, and a constitutional absurdity, to overturn the result of a presidential election, or to deprive a State of a single electoral vote, because a disqualified person happened to be chosen an elector. The changed condi-

tions justifiably wrought this change in construction or application: that instead of giving the disqualifying provision a broad and liberal construction in order to accomplish its wise and wholesome purpose, resort was had—the real purpose of the disqualifying provision being unattainable—to narrow and technical rules, practically defeating the provision, in order to attain the greater object and purpose of the constitution, of having the president selected as the deliberate choice—through the electoral colleges—of the American people.

Whatever may be our individual opinions relative to the judgment of the commission as to the conclusive nature of fraudulent or mistaken action by State canvassing boards, we must all concede that the decisions of the commission on the questions of ineligibility, do not shock the moral sense, and are not subject to any severe criticism.

It is very doubtful whether any one of sufficient standing to be a prominent candidate for the presidency would accept the office on such a barren technicality alone, and if he would, it is quite clear, congress and the country would not permit him to do so.

At all events, I think I have conclusively shown that the electoral system of the constitution as actually and practically developed, is in its main features a wide divergence from its original design.

This brings us to the great question in this case, whether the departure from the original plan, and the changed conditions generally, are to have any effect in determining the constitutionality of the district system.

II.

The district system of choosing electors was not obnoxious to the constitution in its original object and purpose, for the reason that if that object and purpose had been attainable and had been actually accomplished, any division in the votes of the electors of a State, would have been the result of an exercise by each elector of his individual judgment and discretion, and not the result of the political will or partisan voice of the district by which he was chosen.

The truth of this proposition is abundantly established by referring to the institutional and political situation when the district method was first put in use. As I have shown in my historical statement, Virginia was the only State which adopted the district system, in the first presidential election, when, it is not possible to believe, there was any intention of dividing her vote, or of furnishing an opportunity to do so.

Washington, the most distinguished of all Virginians, was to be elected president, and re-elected without opposition. The district system was adopted as an appropriate and convenient method of appointing the persons who were to act as electors, and in the performance of their constitutional function, to exercise their own judgment, and aid in making a suitable choice.

In the second presidential election Massachusetts reduced her system to the district method, but I have not been able to find any evidence that it was done for the purpose of affording an opportunity to the people, if they desired, of depriving Washington, and her own favorite son, John Adams, of a portion of the electoral votes of that State.

It must be remembered that Virginia and Massachusetts, outside of the temporary makeshift in North Carolina in 1792, were the only States to make use of the district method in the first two presidential elections, and that as

far as contemporaneous construction is concerned, these two States are necessarily the most instructive.

They both adhered to the district system in 1796, when John Adams and Thomas Jefferson were opposing candidates.

In Massachusetts there was no division of the electoral votes, but it was made painfully evident that if the district system was retained, the anti-federal or Republican party would gain a foothold in her electoral college in the renewed struggle and greater contest of 1800.

In Virginia the Federal party actually carried one district, and made a corresponding reduction in Jefferson's vote, and the same result occurred in North Carolina, where the Virginia district system had been copied.

As already shown, Virginia and Massachusetts immediately abandoned the district method.

Now, this is the extent of the contemporaneous practice so much relied on, and which led to all the use that was ever made in other States of the district system.

Is it not beyond controversy that the district method was first adopted and used when it was believed and expected that the original design of the constitution was to be carried out, and that just as soon as it was found that the plan of the constitution was incapable of execution, and that the president was to be elected as the candidate of a political party, and the electors were not to exercise any judgment whatever, the district method was abandoned as conflicting with the true intent and meaning of the constitution, as was solemnly declared by the Virginia legislature, while under the tutorship of Madison and Jefferson.

Are not the changed conditions that were then recognized in the most unequivocal way by Virginia and Massachusetts, and subsequently by all the States, entitled to equal recognition by the present generation?

Are they not worthy of the utmost significance, and of the most potent influence, in determining the question whether the district system is now constitutional?

The answer to these questions depends entirely on a proper understanding of the practical difference between a use of the district method under the plan of the constitution as it was understood when it was adopted and that plan after it had been ascertained exactly what it was by actual practice and experience.

That a most radical change took place cannot be denied.

Under the plan as it was supposed to be, the district method was harmless, because it simply enabled the people in each district to select one or more of their most worthy fellow citizens, who, as Hamilton expressed it, would be "most capable of analyzing the qualities" needed in the executive, and who would "most likely possess the information and discernment requisite" to the making of such investigations as "acting under circumstances favorable to deliberation" would enable the electors to make a "judicious combination of all the reasons and inducements which were proper to govern their choice."

It was expected that the electors, without regard to partisan considerations or influences, would simply select the person who, in their judgment, would make the best and most capable official to be at the head of the executive branch of the government.

It was also expected that the people in each State or district would exercise a similar discretion in choosing the electors.

It matters not that human nature and a republican form of government made these things impossible, for there can be no doubt about the intention, and no doubt about the departure from it.

III.

The district system is obnoxious to the plan of the constitution as it was practically and ultimately developed, and as it has now for sixty years actually existed.

When Washington so far upheld the leaders of the federal party that Jefferson was constrained to leave the cabi-

net, and Washington ceased in some extent to occupy the position of a non-partisan executive, the inherent weakness of the plan of the constitution began to show itself, and it gradually became apparent that under the republican form of government established by the constitution the president could only be chosen as the accepted candidate of a political party. The next step in the development was the demonstration of the fact that the States could not exercise their full influence and maintain their relative importance, unless each State cast a solid electoral vote on one side or the other in each presidential contest.

The law which governed the States in this development was as irresistible as any known law of nature.

There is no reason why the ultimate result of this overwhelming and irresistible force in modifying the electoral system of the constitution should not be recognized as a fact accomplished, wholly beyond the assaults of a temporary partisan majority in any State, for it is a political certainty that no State will ever permanently pursue any such suicidal policy.

The electoral system as it is, therefore, is one the distinctive feature of which is, that each State by using a general ticket in choosing electors casts a solid electoral vote.

In the twenty-six presidential elections so far held, the States have individually, in the aggregate, cast their electoral votes 679 times. In twenty-seven instances the votes of a State have been divided, but in only fourteen of them, and they all in 1832 and prior thereto, has the division been due to the district system.

I can assert, therefore, without fear of successful contradiction, that the most characteristic feature of the electoral system of the constitution as practically developed, is the fact that the States each act as a unit in casting the electoral vote to which each is entitled, and that this unity of action is obtained by choosing the electors of each State by popular vote on a general ticket.

Such is the nature of the electoral system as it actually exists.

It follows that the adoption of the district system by a single State is in plain conflict with the electoral system as we have found it in fact to be.

Jefferson with great accuracy and nicety of expression pointed out, in his letter to Monroe in 1800, the ill effects of the district system when only used by one or a few of the States.

A majority of all the electors is requisite to a choice, or at least to keep the election out of the house of representatives.

A candidate may carry enough States on general ticket, and perhaps by very slender majorities, to lack only one of a majority of the electors. If the district system is in use in one or more of the remaining States, he can by carrying a single district, representing but a small fraction of the people, and contrary to the popular will and the will of the States, be elected president.

In other words, the district method when used under the electoral system as it is, simply subverts and overturns the great object and purpose of the constitution in providing for a presidential election. It is using the letter and the dry husks of the constitutional provisions in question to destroy their life and spirit.

IV.

The electoral system as it actually exists is recognized by the fourteenth and fifteenth amendments, and by necessary implication the general ticket method for choosing presidential electors is made permanent, and the only constitutional method of appointment.

The first section of the fourteenth amendment makes all persons born or naturalized in the United States citizens of the United States and of the State wherein they reside.

Section 2 provides that representatives in congress shall

be apportioned among the States according to population. It continues:

"But when the right to vote at any election for the choice of electors for president and vice-president of the United States, representatives in congress, the executive and judicial officers of the State, or the members of the legislature thereof, is denied to any of the male inhabitants of said State being 21 years of age and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens 21 years of age in said State."

The fifteenth amendment simply provides that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

The fourteenth amendment clearly recognizes the right of each State to fix the qualifications of voters, but provides that if any qualifications are prescribed which exclude male citizens of the United States over 21 years of age, the representation of the State in congress shall be proportionately reduced. The fifteenth amendment simply prohibits the State from making any qualifications based on race, color, or previous condition of servitude.

This clearly leaves it constitutional for a State to fix qualifications for voters based on age, residence, property, or education, the only penalty being a reduction in representation.

But is that all there is to these amendments? Most clearly not. What kind, sort, or description of an election does the fourteenth amendment refer to as an election for the choice of presidential electors, and what kind of a vote does the fifteenth amendment refer to when it speaks of the right to vote?

At the time these amendments were adopted, and for

over thirty years prior thereto, the only elections that were known to our political system, or that appeared in the laws of any State, "for the choice of electors for president and vice-president of the United States," were general elections for the election in each State at large and by a general vote, of the number of electors to which each State was entitled.

These, and these only, are the elections for the choice of electors to which the fourteenth amendment refers, and which that amendment most clearly contemplates will be continued as long as the amendment itself remains a part of the constitution.

At the time the constitution of the United States was adopted there existed in each State a legislature composed of a senate or council and a house of representatives, sometimes called the assembly, and frequently spoken of as the popular branch of the legislature.

The constitution of the United States provides for a house of representatives to be elected by the people of the several States, and it defines the qualifications of those who are to vote for representatives, as follows:

"And the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature."

It is a self-evident proposition that this provision contemplates and compels the continued existence in the States of legislatures having the essential features of the legislatures then existing, and in which there was always a branch with a comparatively large membership immediately elected by the people.

If you cannot in this way find the meaning of the language used, and the necessary implications of the constitution, its words become a mass of jargon.

The constitution of Michigan provides for the incorporation of cities and villages, and authorizes the legislature to confer upon them powers of a local legislative and adminis-

trative nature; but the constitution nowhere gives any definition of a city or village, or puts any limitation upon the power of the legislature in regard to them, except those that are imposed by the implications of the constitution.

Yet it is settled constitutional law in that State that the fundamental and necessary characteristics of the various classes of municipal bodies which administer local government in the State cannot be changed by legislation from what they were as fixed by usage and recognition when the constitution was adopted.

Attorney-General *vs.* Detroit, 58 Mich., 213.

And it has theretofore been held that under this system there can be no governments, general or special, that do not immediately represent a popular constituency.

Police Board *vs.* Auditors, 68 Mich., 576.

And that the common council of a city is a distinctive and inseparable feature in municipal government under our institutions, and cannot be done away with or stripped of its legislative powers.

Attorney General *vs.* Detroit, 29 Mich., 108.

At *page 112* Judge Cooley makes use of the following language:

"I shall assent to the position of the respondents that the common council of a city—I mean a body commonly known by that name, whether in any particular charter so designated or not—is a distinctive and inseparable feature in municipal government under our existing institutions, and cannot be done away with. I shall also agree that to leave it in existence and strip it of its legislative powers is as palpable a violation of the constitution as would be its entire abolition. I cannot discover any safe ground in constitutional law, on which the new idea of parceling out the powers of municipal government among local boards, however chosen, can be supported under the provisions of constitutions adopted when such a system was unknown and designed to guard and secure a system quite different."

There is no question but that the constitution contemtemplates the continued existence of many things connected with the government and with our institutions, and that it is necessary to recognize these implications whenever we undertake to decide any question of constitutional law.

From this standpoint I submit that it is perfectly clear that the fourteenth amendment, by necessary implication, renders the general ticket method of choosing presidential electors permanent, and beyond the interference of the State legislatures.

It is true that these amendments were designed to secure the civil rights of the colored people, but they were wisely and necessarily made general, so that the white people would have just as many rights as the colored.

The right to vote mentioned in the fifteenth amendment, evidently refers to the same right to vote as the right to vote at certain elections named in the fourteenth amendment; and it is not reasonable to believe that both of these amendments could be practically defeated, by legislation or constitutional amendment, in any of the States, providing that there should be no such elections and therefore no such right to vote.

If it is said, that no such thing was thought of when these amendments were framed and adopted, my reply is, that that fact is the strongest kind of proof that the continuance of these elections and of the right to vote thereat, was assumed and expected. There was no thought, idea, suggestion, or expectation to the contrary.

The learned counsel for the defendant in error insists that if this is a correct application of the fourteenth amendment, it must logically follow that all of the "executive and judicial officers of the State" must be elected by a vote of the people, and they point out the absurdity of any such position by showing that in many of the States, as in Massachusetts, the judicial officers are appointed and are not elected.

This is a misapprehension. The fourteenth amendment, in speaking of "the right to vote at any election for the choice of electors for president and vice-president of the United States, representatives in congress, the executive and judicial officers of the State, or the members of the legislature thereof," refers to the popular elections then known to the people, and the right to vote mentioned was the right to vote at such elections; and this amendment, therefore, clearly contemplates the continuance of such elections and of the right to vote thereat. In other words, it plainly contemplates the continued existence of the essential features of the elections then known to the people and to our political system. If the judicial officers, or the subordinate executive officers of any State, were not then all elected by the people their election by a popular vote was not a part of the system which the fourteenth amendment contemplates shall be continued. At the time this amendment was adopted the chief executive officer of each State was elected by the people, and the members of both houses in the legislature were also elected by the people, the governor by a plurality vote or, in some instances, a majority vote of all the people of the State, and the members of the legislature by districts. The essential features of this system we insist must be continued in order to give the fourteenth amendment full force and effect. The amendment referred to elections for the choice of representatives in congress, and the constitution provides that voters for members of congress "shall have the qualifications requisite for electors of the most numerous branch of the State legislature," so that a State, by prescribing a property or educational qualification for voters for members of the legislature, could fix the qualifications of voters for representatives in congress; and therefore if our position is not correct, the whole object and purpose of the fourteenth amendment could be defeated by the States by legislation, or by amendment of their constitutions, providing that there should be no elections for

the election of the governor or judicial officers or members of the legislature, and no elections for the choice of electors for president and vice-president of the United States.

In some of the States, as they existed at the time the constitution was adopted, the State senate, or what answered for it, was not elected by the people at all, but in all of them the largest and most popular branch was elected by a direct vote of the people. The senators frequently held office for six years, a part only going out at a time, but the house of representatives were elected annually, or, at the farthest, once in two years.

The constitution certainly contemplated the continued existence of the essential features of the lower houses of the State legislatures, sometimes called the assembly, and in one State called the house of commons.

For like reasons, the fourteenth amendment contemplates the continued existence of the essential features of our presidential elections as they were then known and understood by all the people.

The most essential feature of those elections was the election on a general ticket by a plurality of votes of the number of presidential electors to which each State was entitled, so that each State could cast a solid vote and exercise a united and powerful influence in the choice of the chief magistrate. This method of State action had been resorted to by all of the States for years, and no use had been made of the district system since 1832, and no use had been made of the legislative system during the same period, for the purpose of dividing the vote of a State, or for the purpose of defeating the will of the State as it existed at the time of the presidential election. Each State voted solidly one way or the other, a small majority in one State suppressing a large minority, and a like majority doing the same in another, so that a substantially just equilibrium was maintained. The States had all adopted this system as a matter of mutual political protection as

against each other. It cannot now in justice be held, that a temporary partisan majority in a State legislature can deprive the State of the protcction so vouchsafed to it.

Under the changed conditions, the district system has become a constitutional absurdity. Nothing shows it more plainly than the necessary implications of the fourteenth amendment.

V.

The plenary power of the States over the appointment of electors is at once the main strength and the fatal weakness of the proposition that it is now competent for any State to adopt the district system.

1. It's main strength.

The constitution vests the power to appoint in the State, and the manner of the appointment in the legislature thereof. No power whatever is vested elsewhere, except the power given congress to fix the day of choosing the electors, and the day they are to meet and vote.

My brethren on the other side will undoubtedly call attention to the utterances of the members of the electoral commission of 1877 on this subject; but this court in an opinion by Mr. Justice Gray has already said:

"The sole function of the presidential electors is to cast, certify and transmit the vote *of the State* for president and vice-president of the nation. Although the electors are appointed and act under and pursuant to the constitution of the United States, *they are no more* officers or agents of the United States than are the members of the State legislature when acting as electors of federal senators, or the people of the State when acting as electors of representatives in congress. Constitution, art. 1, sec. 2, 3.

"In accord with the provisions of the constitution congress has determined the time as of which the number of electors shall be ascertained, and the days on which they shall be appointed, and shall meet and vote in the State,

and on which their vote shall be counted in congress; has provided for the filling by each State in such manner as its legislature may prescribe of vacancies in its college of electors; and has regulated the manner of certifying and transmitting their vote to the seat of the national government, and the course of proceeding in their opening and counting them.

"Congress has never undertaken to interfere with the manner of appointing electors, or, where (according to the general usage) the mode of appointment prescribed by the law of the State is election by the people, to regulate the conduct of such election, or to punish any fraud in voting for electors; but has left these matters to the control of the State."

In re Green, 134 U. S., 379.

It is assumed, and the argument is, that the power so possessed by the States, not being subject to any express limitations, is wholly without restraint, and is beyond the reach of any implied limitations.

2. It's fatal weakness.

The fact that the power vested in the States is not subject to any express limitations, except those mentioned, and is not subject to any interference by congress, is the most cogent and powerful reason for holding them to all the implied restrictions of the constitution.

The very liberty possessed by the States in this matter is in and of itself a restraint on their action. The States, in exercising the power of appointing presidential electors, or in fixing the manner of making those appointments, do not do so in virtue of the legislative power, or of any other power possessed by them, under their own constitutions. The power to appoint these electors is a power delegated to and conferred on the States by the constitution of the United States, and is subject to the necessary implications, arising from the nature and purposes of the grant of power so made.

The crown in England is hereditary, the succession being regulated by act of parliament.

Would it be competent for a State legislature to pass a similar act, and provide that A. B. and his heirs at law forever, or some one or more of them, should appoint the presidential electors of that State?

In Tennessee at one time the legislature designated certain persons by name, and vested them with the power of appointing the electors. If such an act was passed in any State now, and its validity was contested, could it be sustained?

There would seem to be some limitations on the power of the State when we look at the subject, even from the standpoint of the original design of the constitution.

And if this is true, does it not follow, that where the States, in the exercise of the liberty of choice originally conferred on them, have by a mutual and common consent, abandoned one system, because it destroyed the unity and weakened the power of each State, and adopted a counter or contrary system, the same being occasioned by inevitable and unavoidable changes in the electoral system itself, and which were wholly beyond the power of the States to arrest, a necessary implication arises or is created that no State will return to the abandoned system.

Treating the States as equals, and as co-ordinate parties to the constitutional compact, is it not logical, is it not just, is it not constitutional, to hold them to the implications and restrictions their own mutual and uniform conduct imposes?

VI.

The proposition that the district system is still constitutional, is based on (1) *a misapprehension of the original intent and meaning of the constitution*; (2) *a want of knowledge of the exact use that was made of the district system, and the causes which led to the general ticket, and* (3) *a failure to appreciate the real nature of the implications of the fourteenth amendment.*

In *2 Burgess' Political Science and Constitutional Law, p. 216*, the plenary power of the State legislatures over these appointments is stated as follows:

"The appointment of the electors from each commonwealth is thus made wholly and exclusively subject to the the direction and control of the legislature of the commonwealth, unless limited by some other clause of the constitution. So far as this clause is concerned, the legislature of the commonwealth might authorize the election of the electors by universal suffrage, or by a restricted suffrage, directly or indirectly, by district ticket, or general ticket, by single or cumulative vote; or it might authorize the executive of the commonwealth to appoint them; or it might choose them itself; or cause them to be selected by any person and in any manner which it might deem suitable. It may, and it alone can, direct how a disputed election of the electors, or any one of them shall be determined. It may, and it alone can, determine the qualifications of the electors, outside of the one qualification prescribed by the constitution, viz: that they shall hold no office of trust or profit under the United States. Up to the point of the completion of the election of the electors the legislature of the commonwealth has plenary and exclusive power conferred upon it by this provision of the constitution. Let us examine now, if any subsequent clause of the constitution puts limitation upon the fullness of this power or impairsits exclusiveness."

The author then refers to the clause giving congress the power to fix the time of choosing the electors and of their meeting to vote. He next shows that the fifteenth amend-

ment applies to every election in the United States, and if the electors are chosen by popular election, no citizen can be disqualified from voting on account of his race, color or previous condition of servitude.

Thirdly, the author quotes the second section of the fourteenth amendment and comments thereon as follows:

"This clause has led some students of the constitution to claim that the presidential electors must be chosen by popular election; *i. e.*, that the legislature of the commonwealth has no power to order their selection in any other manner. The declaration in the original provision that each "*State*" (commonwealth) shall appoint the electors appears also to support this view. It is urged that the "State" (commonwealth) is the people, not the legislature. But I think this is fallacious. No one, I think, would claim that this clause of the fourteenth amendment orders the judges of the commonwealth to be elected by the voters, and yet it certainly does if it requires the presidential electors to be so chosen. I take it that this clause simply means that, when the legislature of the commonwealth commands the appointment of presidential electors by popular election, then it must follow the rule of suffrage indicated in this clause, or suffer the reduction of the number of the electors from the commonwealth, in proportion as the rule of suffrage which it ordains narrows the suffrage indicated in this clause. Thus far, and thus far only is the full power of the legislature of the commonwealth over the election of the presidential electors modified by this provision."

I have quoted these extracts from the work of Prof. Burgess, because they are as strong and as accurate a statement of the position of the learned counsel for the defendant in error, and of the supreme court of the State of Michigan as can well be made.

If their position as so stated, cannot be sustained, the reversal of the judgment below is inevitable. In my judgment it cannot be sustained, and for three principal or main reasons:

1. Their position is based, and in the mind of Prof. Burgess and of others entertaining the same view, is founded, upon an erroneous impression as to the intention of the framers of the constitution.

As far as Prof. Burgess is concerned, the proof is easily produced.

At *p. 219*, he controverts the statements of Hamilton and Madison with the following unwarranted assertion:

"There was certainly no intention of making the appointment of the presidential electors subject to popular election. I think it is evident that the framers were anxious to avoid this. The well known fact that in several of the commonwealths the legislatures chose the presidential electors at the first election and for a considerable period afterwards is certainly good evidence of the general opinion of the meaning of the phrase, 'each State' (commonwealth) shall appoint."

Mr. Justice Strong made some similar comments while a member of the electoral commission of 1877. Speaking in the Florida case of the intention of the framers of the constitution as to the method of choosing electors, he said:

"I doubt whether they had in mind at all the idea of a popular election as a mode of appointing State electors. They used the word 'appoint' doubtless thinking that the legislatures of the States would themselves select the electors, or empower the governor or some other State officer to select them. The word 'appoint' is not the most appropriate word for describing the result of a popular election. Such a mode of appointment, I submit, is allowable, but there is little reason to think it was contemplated, and still less reason to suppose that the idea of a contested popular election for electors had any existence in the minds of its framers when the constitution was formed. It was not until years afterward that the electors were chosen by popular vote."

Electoral Count, 1877, p. 997.

If a careful examination of the proceedings and debates of the federal convention, and of Hamilton's explanations in the *Federalist* shows anything, it proves that Prof. Burgess and Justice Strong were mistaken in the view that popular appointments were not contemplated.

The words "appoint," "elect," and "choose," have no such generic difference, and no such meaning in common parlance, as to justify the conclusion that the constitution does not contemplate the choice of electors by popular vote. Such a construction would exclude the district method as well as the general ticket, and both were used in the very first elections.

In addition we have Madison's declaration, in a letter written in 1823, that the district system was almost exclusivsly the one contemplated. He said:

"The district mode was mostly, if not exclusively, in view when the constitution was framed and adopted; and was exchanged for the general ticket and the legislative election as the only expedient for baffling the policy of the particular States which had set the example."

3 Writings of James Madison, pp. 333, 334.

2. Their position is also based on a want of knowledge as to just what has taken place in the history of these appointments, and a consequent inability to appreciate the full force of the political and constitutional development that brought all the States to the uniform practice of the general ticket and an undivided or solid vote.

I know only too well the difficulty I have had in finding out the exact course pursued in each State, and the political and partisan causes of the changes from time to time made. It is certain that the most significant and important facts have not been generally known, or understood, and that no historian or author has ever given the subject a full examination, much less an exhaustive analysis; and I am compelled to submit the case on my own imperfect work.

3. Their position is also based upon, and is the result of a want of appreciation of the implications arising from the fourteenth amendment.

It will have been observed that Prof. Burgess makes the same mistake as the counsel for the defendant in error, in assuming that if the fourteenth amendment secures to the citizen the right to vote for presidential electors, it also enforces the same right to vote for the executive and judicial officers of the States, as they are mentioned in the same clause with presidential electors.

I have already pointed out the error of this reasoning. The difficulty with the argument is, that too strong an implication is set up or asserted, so that its weakness or absurdity will lead to the conclusion that there are no implications arising from the fourteenth amendment.

That amendment refers to and mentions the right to vote at certain elections, and concedes, or recognizes the fact, that the States have the power to fix the qualifications of the voters; but it at the same time assumes that the elections in question are going to be held. An examination of the laws and constitutions of the several States in force at the time, and of the laws and constitution of the United States, for the purpose of ascertaining what these elections are, which it is assumed will be continued, brings us to a realization of the fact, that the most important of these elections, is the general election which takes place in each State once in four years for the election on a general ticket of presidential electors.

At the time the fourteenth amendment was adopted it was not true that all the executive and judicial officers of the States were elected by the people; but it was true, without any qualification whatever, that all presidential electors were elected by the people on general tickets, and that all representatives in congress, and members of the State legislatures were immediately elected by the people.

It is necessary to keep in mind the difference between

an implication based on the language of a constitutional provision, and an implication based on an application of the provision to a known historical fact.

Constitutional provisions cannot be fully understood unless they are read in connection with a history of the times in which they were adopted, and the causes which led to their adoption are fully understood.

VII.

There is no rule of constitutional interpretation, or of judicial duty, which requires the court, in determining the constitutional validity of the district system, to adhere to the obsolete original design of the constitution, and to disregard the plan of the electoral college as it actually exists, after a century of practical experience and development.

It is the deliberate judgment of the supreme court of Michigan that the doctrine of constitutional development and growth, as understood by students of political science and constitutional law, is not entitled to any judicial recognition, and can have no place in constitutional jurisprudence.

In the opinion of the court below as prepared by Mr. Justice Montgomery is the following:

"There would doubtless be great force in the practical construction which has obtained for sixty years, even though not contemporaneous, if such construction involved of necessity a negation of the right claimed by the legislature in this case; but the fact that the several States have provided by their legislatures for choosing electors on a general ticket does not involve an assertion that the power to choose by districts does not exist. And in so far as the argument of counsel assumes that our constitution is subject to growth it is, in my judgment, inconsistent with the purpose and duty to sacredly maintain the integrity of that instrument, to treat it as subject to modification except by the prescribed agencies and by the prescribed methods.

And especially is it inconsistent with established rules to say that by non-user a commonwealth may lose the power to exercise rights expressly delegated in a written constitution. If under the constitution and after forty years of practical construction the State had the right to choose electors by districts, it does not lie with any court to assert that that right had been lost to the State by non-user."

In my judgment the argument here so plausibly presented, if adopted by the Supreme Court of the United States, in the determination of all the varied questions of constitutional law constantly coming before the court for decision, would soon result in the complete destruction of the constitution itself and the adoption of a more elastic system of government.

As a matter of fact there can be no such thing as an absolutely rigid constitution. It is an impossibility, although the supreme court of Michigan in its wisdom most solemnly declares, that it will recognize no other. Coupled with this declaration, is the assumption of the court that it knows exactly what the constitution meant when it was adopted, and it proceeds to enforce its views accordingly. There would be no objection to this course if the constitution, when it came from the hands of the convention that framed it, had had any such well known and exact or concise meaning as to enable us to say that it was, and was intended to be, an absolutely rigid instrument, wholly without any capacity for flexibility, modification or change, except by amendment in the authorized way.

The most cursory examination of the convention debates will convince any one that if the framers of the constitution had attempted to agree upon language that covered the whole range of subjects, and that was so exact and concise that the different sentences and phrases could have but one meaning, and were incapable of construction or adaptation, they never would have agreed on anything.

The imperfections of the language, if nothing else, rendered a perfectly well understood and definite constitution

an impossibility, and very much had to be left to subsequent interpretation.

The members of the convention agreed upon the text of the constitution, but from widely different standpoints, and no two of them would have agreed if they had lived during the entire first century of the existence of the country under the constitution, and they had been the members of a court charged with the special duty of construing the constitution which was the result of their thoughtful and patriotic deliberations.

In *1 Bryce's American Commonwealth, p. 350,* is a chapter devoted to "The Growth and Development of the Constitution," in which he refers to the flexibility of the English constitution as compared with the rigidity of the American constitution. He continues on page 352:

"It will at once be asked, how can any constitution be truly rigid? Growth and decay are the necessary conditions of life of institutions as well as of individual organisms. One constitution may be altered less frequently or easily than another, but an absolute unchangeable constitution is an impossibility. The question is pertinent; the suggestion is true. No constitution can be made to stand unsusceptible of change, because if it were it would cease to be suitable to the conditions midst which it has to work, that is, to the actual forces which sway politics. And being unsuitable it would be weak, not rooted in the nature of the State and in the respect of the citizens for whom it exists, and being weak it would presently be overthrown. If, therefore, we find a rigid constitution, tenacious of life, if we find it enjoying, as Virgil says of the gods, a fresh and green old age, we may be sure that it has not stood wholly changeless, but has been so modified as to have adapted itself to the always altering circumstances that have grown up around it. Most of all, must this be true of a new country, where men and circumstances change faster than in Europe, and where, owing to the equality of conditions the leaven of new ideas works more thoroughly upon the whole lump.

"We must therefore be prepared to expect that the

American constitution will, when its present condition is compared with its fire-new condition in 1789, prove to have felt the hand of time and change.

"Historical inquiry verifies this expectation. The constitution of the United States, rigid though it be, has changed, has developed. It has developed in three ways to which I devote the three following chapters."

The chapters following are entitled, "The Amendment of the Constitution," "The Interpretation of the Constitution," and "The Development of the Constitution by Usage."

At *page 354*, Mr. Bryce says:

"We shall perceive after examining these three sources of change, not only that the constitution as it now stands owes much to them but that they are likely to modify it still further as time goes on. We shall find that, rigid as it is, it suffers constant qualification and deflection, and that while its words continue in the main the same, it has come to mean something different to the men of 1888 from what it meant to those of 1808, when it had been at work for twenty years, or even to those of 1850, when the fires of protracted controversy might be thought to have thrown a glare of light into every corner of its darkest chambers."

Uncertainty as to the meaning of the constitution manifested itself in the convention during its deliberations, and this uncertainty became greatly intensified when the convention adjourned, and the question whether the constitution should be ratified became a matter of political controversy in each State.

It is sufficient to say that the most diversified views prevailed, and that the members of the convention took part in the discussion and agitation that followed with as much liberty of opinion as other people.

When the different State conventions came to prepare their resolutions of ratification, a number of them adopted resolutions of construction.

I will refer to one instance of this kind of interpretative action. When the conclusion was reached that the house of representatives should consist of members who should represent the people, and not the States, all the delegates from New York withdrew except Alex. Hamilton.

The constitution as submitted provided that the house of representatives should be composed of members "chosen every second year by the people of the several States."

This language seemed to imply that each State would be required to elect all of her representatives on a general ticket by a vote of all the people of the State.

To avoid this construction New York put the following into her resolutions of ratification:

"That nothing contained in the said constitution is to be construed to prevent the legislature of any State from passing laws at its discretion, from time to time, to divide such State into convenient districts, and to apportion its representatives to and amongst such districts."

This seems to be a case of contemporaneous construction by which the constitution was immediately warped from the literal meaning of its text.

In *2 Burgess' Pol. Sci. and Const. Law, p. 203*, the question whether the crown of Great Britain has lost the veto power by non-user is discussed as follows:

"I will only say here, as to the veto power of the crown, that it has not been used since the year 1707. Is it to be regarded as extinguished by disuse? We know it to be a fundamental principle of the English constitution that the crown can lose no rights by its own negligence. The loss of certain royal rights by the negligence of an official might be consistent with this principle, but not the loss of a prerogative which the wearer of the crown alone can exercise. We cannot then, according to the principle of English jurisprudence, regard this power as having lapsed. It exists, *de jure*, as truly as it ever did. Law and fact, however, seem to be in conflict upon this subject; and, to settle the question satisfactorily, we must have recourse to the reasons of

political science. The dictum from this standpoint, I think, must be, that where no royal prerogative established by the constitution is affected by the act of the houses of parliament, the veto power of the crown should be regarded as extinguished by disuse; but that where such royal prerogatives are affected, the veto power cannot be abolished, save by the express declaration of the State itself. *Political science neither permits the eternal reign of a fiction of law after its reason has disappeared, nor the overthrow of a sound principle by a generalization from negative precedents.*"

VIII.

The Michigan electoral act is in direct conflict with the first section of the fourteenth amendment, because it is a State law which does "abridge the privileges and immunities of citizens of the United States," and does deny to persons within the jurisdiction of that State, "the equal protection of the laws."

In the first seven subdivisions of this brief, I have discussed the question whether the States still have the constitutional power to adopt the district method for the choice of electors, without referring to the great constitutional changes wrought by the first section of the fourteenth amendment.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Words of greater legal significance, or of more constitutional force and power, can not be found in the English language.

It is doubtful whether any one has as yet began to appreciate the changes made by this section in the framework and nature of the union—in the relations of the States towards each other and the general government—in the limitations placed upon the States—in the increased power over the States conferred on congress. It will take a century of controversy, discussion, construction, and adaptation, to unfold and bring forth its full meaning. We are merely at the threshold. The door is not yet wide open.

It was at first thought that this amendment must be so construed and applied as to be a protection to the colored race only; but it was soon discovered that the amendment itself made no such distinction, and that all citizens and all persons of every kind and description were within its beneficent provisions.

1. Citizenship.

Prior to this amendment there was no such thing as a defined national citizenship, or a citizenship within the protection of the general government. The constitution in two or three instances used the words, "a citizen of the United States," but this citizenship was based entirely on State citizenship, for the only other provisions was one that "the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States," and another authorizing Congress "to establish a *uniform* rule of naturalization."

The fourteenth amendment, then, was the first time the country adopted a constitutional definition of citizenship. It created a defined national citizenship, and made State citizenship identical with it.

Having defined national citizenship the amendment proceeds to lay down a rule for its protection, viz., that "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States."

If the right to vote for electors, and thereby to participate in the election of the president and vice-president is not one of the privileges of a citizen of the United States, is there anything of utility and value that can be regarded as such a privilege?

It is true the electors are State officers, and their election is a State election, conducted under State laws; but when the electors meet to cast their votes they perform for their respective States a federal duty and a national function, and this duty and function is the only object of their election.

Before the civil war, and the adoption of the fourteenth amendment, when the spirit of State insubordination, and jealously of, and resistance to the general government was abroad in the land, the district method for the choice of electors could be regarded as constitutional on the theory that the States had unlimited power over their own citizens, and having this plenary power, they had a right to divide or throw away their own electoral votes; or, if the State government so willed to withdraw entirely from the presidential elections, or any one of them. Such an act of partial secession might be sustained as within the unlimited power possessed by the States over the appointment of electors, but has not the rights of national citizenship as established and guarded by this provision of the fourteenth amendment overturned this theory of independent and uncontrolled State action?

Is it not now true, that if all the voters in a State save one should decide to not take part in a presidential election, that that one, by virtue of his national citizenship, would have a constitutional right to cast the electoral vote of his State? If the rights and privileges of national citizenship do not extend this far, of what utility are they, and to what extent does the fourteenth amendment cement the bonds of the union?

2. Equal protection of the laws.

Having secured, beyond State infringement, the privileges and immunities of citizens of the United States, the fourteenth amendment takes another very decided step forward, and declares that no State shall "deprive any person of life, liberty or property without due process of law," and not satisfied that this provision of the Great Charter was sufficient, the words, "nor deny to any person within its jurisdiction the equal protection of the laws," are added.

This court has already adopted a construction and made an application of the clause for the equal protection of the laws, that is of the highest consequence in this case.

Inasmuch as courts and juries are instruments of the government for the enforcement of the laws, and constitute the tribunals in which remedies are furnished and wrongs are redressed, all men of like age and qualifications have a right to participate in jury service, and any State law which excludes from jury duty men possessing the requisite personal qualifications of age, mental competency, and impartiality is in conflict with the fourteenth amendment and void.

The doctrine of equality before the law is thus fully and practically enforced.

The argument that there was no intention to interfere with the power of the States to regulate their own judicial systems and to determine who should serve as jurors, was rejected as giving the amendment too narrow a construction, and not in keeping with the great purposes sought to be attained.

The same course of reasoning, and the same great doctrine of equality before the law, defeats the Michigan electoral law of 1891.

The president of the United States is the chief executive officer of the government, and is charged by the constitution itself with the duty to "take care that the laws be faithfully executed." He has as much, if not more, to do

with the enforcement and due execution of the laws than the courts, or the jurors who serve therein.

It is essential, therefore, to the due appointment of the president that the people of each State, through the exercise of the elective franchise by the qualified part of them, shall participate in the presidential election on an equality with the people of all the other States.

That equality, as it practically existed and was understood when the fourteenth amendment was adopted, is annihilated and destroyed by an adoption of the district method for the choice of electors.

There can be no question about this as a matter of fact.

If it is suggested that the laws the president enforces and executes are not the laws the equal protection of which is secured, and that the clause should be construed to read "no State shall deny to any person within its jurisdiction the equal protection of *its own* laws," I reply that the clause itself contains no such qualifying words, and if it did the force of the argument would not be destroyed, because the constitution authorizes the United States to protect each State against domestic violence, and the executive and judicial officers of the States are bound to enforce the constitution, and the laws of the United States made in pursuance thereof, and by express requirement of the constitution, this is made a part of their official oaths *as State officers.*

The constitution and laws of the United States are a part, and a supreme part, of the laws of each State, and the equal protection of which may be denied by State action.

The court is so familiar with its own decisions construing the fourteenth amendment, and the cases are cited and quoted from to such an extent in the brief of my associate, Mr. Duffield, that there is no occasion for me to refer to them.

I can only say in conclusion that I regret my own want of ability to fully and clearly set forth the reasons which lead me so strongly to the conviction that the district method is now antagonistic to, and in plain conflict with, the union of the States—under the constitution—as rebuilt and reconstructed by the fourteenth amendment.

I can safely rely on the learning and ability of the members of this court, to make a more complete and convincing presentation of my own views.

IX.

The division of the twelve congressional districts of the State into two districts for the election of the so-called electors at large is without historical precedent, and on any view of the general question of the validity of electoral districts, is in conflict with the letter and spirit of the constitution.

The States are each authorized to appoint as many electors as will equal the total number of their senators and representatives in congress; and if the congressional districts are used as electoral districts, it would appear more in accordance with the design of the constitution to have the senatorial electors either appointed by the legislature or elected at large.

Each of these methods of appointing two electors at large have been used in connection with districts identical with the congressional districts.

But the division of a State into two districts for the election of the two so-called senatorial electors was never suggested until the passage of the Michigan electoral act of 1891, and as such a system of double or combined districts is clearly not in harmony with the spirit of the constitution, and was wholly unknown to the fathers of the republic, there is no escape from the conclusion that it conflicts with the constitution.

If it is competent to have a district system at all, that system must be the simple district system of dividing the territory of the State into a number of districts, with no district over lapping another, and providing for the election of one or more electors from each district.

If this overlapping system is valid; that is, if the same voter or body of voters can be allowed to vote in two or more districts, the gerrymandering of districts, bad enough with the simple district system, can be used to accomplish the most extraordinary results.

If the State can have two systems of districts; that is, compound districts, as distinguished from simple districts, there is no reason why there cannot be three or more such systems.

Thus: First divide the State into eight districts; then divide the State into four other districts, and then divide the State into two other districts, so that each voter will vote in three different districts, or jurisdictions.

Nothing could be more absurd or more in conflict with the methods of a representative or republican form of government.

The proposed eastern and western electoral districts, erroneously called districts "at large," may at first appear to be very innocent and harmless; but one does not have to reflect very long to see that a line of demarkation must be drawn somewhere, and the only place where it can be drawn with any pretense of reason is on the line that excludes any and all compound districts.

The moment we go beyond the simple district system the subject becomes a sea of confusion, wholly beyond any intelligent elucidation, and with no means of drawing any line of limitation.

X.

The provision in the act of 1891, fixing the time the electors shall meet and cast their vote, at a different date than that fixed by the act of congress, is so connected with the objects and purposes of other and valid portions of the act, that the whole act must necessarily be declared void under well settled and familiar rules of interpretation.

If there was simply a mistake as to the date, and it was evident no other provisions of the act were influenced by, or were based upon the mistake, there would be no difficulty in holding all the act valid except the provision fixing the date.

But we have no such case.

Under prior laws, a tie vote was decided by the electors when they convened, and by a plurality vote. This enabled the party who had received the greatest popular approval in the election to secure the vote on which the tie occurred.

The act of 1891, however, expressly provides that the governor shall call a special session of the legislature to break the tie, and of course, if the electors were to meet in December, a special session would have to be called to enable the legislature to perform that duty, although a new legislature fresh from the people would assemble the first week in January.

Is it reasonable to believe that the legislature would have provided for calling a special session if it had been understood that the electors would not and could not, meet until the new legislature was in session?

A special session involves a large expense and considerable inconvenience, and a presumption that the legislature would have kept the provision for a special session in the act, if it had had correct information of the date fixed by congress, is one the court ought not to make, and one that cannot be made at all, except on the theory that the

legislature was composed of men who were wholly without patriotism and devoid of every sense of public duty.

It is fair to presume that there was a limit to their partisanship.

The court below disposed of this question as follows:

"It is urged that if it had been understood that the legislature which is to be chosen at the same general election at which the presidential electors are chosen was to convene before the date when under the law of congress the electors are permitted to cast their vote, that it is not to be presumed that the legislature would have provided for convening the legislature in special session at large expense. But we are not able to say, as matter of law, that this is true. The new legislature will sit but three legislative days prior to the date fixed by the law of congress for the meeting of electors. Nor is it clear beyond question that it was not the purpose and intent of the members of the present legislature to retain the power of choosing the electors in case of tie rather than commit it to their successors. We think there are evidences afforded by the act itself that such was their purpose. We cannot, therefore, say that this statute would not have been passed in the form in which it is without the provision relating to the time of the meeting of electors, and, therefore, are not justified in holding that the law is wholly inoperative, because of the conflict of that provision with the law of congress upon the same subject."

This reasoning is erroneous because it attributes to the Michigan legislature a purpose that is in conflict with the principle of republican government, that an old legislature already rejected by the people ought not to usurp the functions of its successor. It is certainly erroneous to make an argument of this nature to sustain a still greater outrage on popular rights.

The extent to which an act of a State legislature is invalid because in conflict with an act of congress or the constitution of the United States is necessarily a federal question.

XI.

The creation of the offices of alternate electors is wholly without warrant in the constitution, or in any usage that has grown up under it, and the system proposed conflicts with the act of congress relative to the filling of vacancies in the electoral colleges.

The constitution authorizes each State to appoint electors, but makes no reference to alternate electors.

The right to appoint electors carries with it by implication the right to fill vacancies; but is this system of alternate electors one for the filling of vacancies?

I think not.

The act of congress of 1845 recognizes the right of each State to fill the vacancies that may occur in its own electoral college. The language of the act as perpetuated in the Revised Statutes of the United States, of 1874, p. 21, Sec. 133, is as follows:

"Each State may by law provide for the filling of any vacancy which may occur in its college of electors when such college meets to give its electoral vote."

It is not a strained construction of this language to say, that it means that the vacancies are to be filled when they occur, and not until then.

The offices of presidential electors do not commence until they meet to cast their votes in January. Until that meeting they are simply electors elect. Until that meeting, therefore, no vacancy can possibly exist. When the vacancy exists an appointment can be made to fill it, and it cannot be made until then. The appointment cannot be anticipated and be made long before the vacancy occurs. While this reasoning may be considered rather technical and refined, it must be remembered that everything connected with the election of the president of the United States, the chief magistrate of over sixty millions of people, is of the

very highest importance; and the result of a presidential election might possibly depend upon the time when a vacancy might properly be filled. In Michigan the legislature and governor are elected on the same date as that of the presidential election, and that is the case in most of the States. The legislature and governor then elected take possession of their offices, and the control of the State government on the first of January following the election, so that officials fresh from the people would be the ones who would make an appointment to fill any vacancy that might occur on the second Monday of January.

Would an act be in harmony with the act of congress if it provided that the outgoing legislature, before it adjourned its regular session the spring before, or at a special session to be called for that purpose, should appoint a number of alternates to fill possible vacancies that might occur in January after they had gone out of office?

I submit that while a State, under the act of congress, can provide by law for the filling of vacancies, the provision that is made must provide that the appointment to fill the vacancy is to be made when the vacancy occurs and not before.

The implied right of the State to fill vacancies does not go beyond this.

The constitution does not contemplate the creation of a new and independent office with a right of succession, such as the right of the vice-president to become president upon the death of the incumbent of that office.

As the act of 1891 provides for the election of alternate electors before the time fixed by the act of congress, for the making of appointments or the holding of elections to fill vacancies, the act is in conflict with the act of congress, and is wholly void.

The president has power to appoint the judges of the supreme court, and whenever a vacancy occurs to make an appointment to fill it; but could the president, even with

the authority of an act of congress, make an appointment in anticipation of a vacancy; that is, make an appointment to take effect when the first vacancy occurs? Could congress provide for the appointment of a full set of alternate judges, to take their seats on the supreme bench as vacancies occur?

In the Florida case, before the electoral commission, the question was presented whether the election of a disqualified person created a vacancy in the office of presidential elector.

Mr. Justice Field quoted the act of congress authorizing each State to provide by law for filling vacancies which occur in its electoral college "when such college meets to give its electoral vote," and he also quoted the Oregon acts authorizing the electors present to fill any vacancy "occasioned by death, refusal to act, neglect to attend, or otherwise." He then said:

"It seems evident from these provisions that there could be no vacancy in the office of elector unless the office had once been filled. The events upon the occurrence of which the statute declares that a vacancy shall occur in any office, all imply the existence of a previous incumbent."

"The word 'otherwise' used with respect to a vacancy in the electoral college, does not enlarge the scope of that term. The code having enumerated under one title the events upon which a vacancy may arise, including death, resignation and other causes, proceeds to declare, under another title of the same chapter, that when a vacancy occurs in the office of elector by death, refusal to act, or *otherwise*, meaning thereby any other cause which would remove an incumbent, the electors present may fill the vacancy. As here there never had been an incumbent, there could be no vacancy in the sense of the statute by death or otherwise."

Electoral Court of 1877, p. 993.

A similar course of reasoning applied to this Michigan scheme for alternate electors much more clearly brings us to the conclusion that the scheme is not one for the filling of vacancies. It is simply a plan to prevent vacancies.